92-98

No. ____

Supreme Court, U.S.
FILED
JUL 13 1992
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KAREN L. KOURI,

Petitioner

v.

LIBERIAN SERVICES, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fourth Circuit erred in holding, in conflict with decisions of other circuits, that in order to establish a claim of sexual harassment, an employee must show that her supervisor made explicit sexual remarks or requests for sex in exchange for an employment benefit.

2. Whether the Court of Appeals for the Fourth Circuit erred in failing too hold that an employer is liable for its own acts of retaliation taken in its name against an employee because she filed a complaint alleging that she had been sexually harassed.

3. Whether the Court of Appeals for the Fourth Circuit erred in not holding that an employer is liable under principles of agency for the acts of sexual harassment committed by the employee's immediate and sole supervisor who was also the head of the employer's personnel department, reported solely to the president of the company, and who was clothed with authority to affect the employee's terms and conditions of employment.

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Karen L. Kouri, by her attorney, hereby petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit (App.) is not reported. The opinion of the district court (App.) is reported at 743 F Supp. 448 (E.D. Va., 1990)

JURISDICTION

The judgement of the Court of Appeals was entered on April 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Section 703(a)(1) of Title VII (42 U.S.C. 2000e) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, sex or national origin.

2. Section 703(4)(a) of Title VII (42 U.S.C. 2000e) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this Title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Title.

STATEMENT OF THE CASE

A. Background

This case arises out of a Complaint filed by Karen L. Kouri, on April 25, 1990, in the United States District Court for the Eastern District of Virginia. (JAP 665-668) In her complaint, Kouri named as party Defendants, James N. Todd [''Todd''], Liberian Services, Inc. [''LSI''] and a subsidiary of LSI, Administrative Control Services, Inc. Kouri's complaint contained four (4) counts, one under Title VII of the Civil

Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (1988) and three state common law claims which included claims for intentional infliction of emotional distress, assault, and battery.

In her Title VII claim, Kouri alleged that she had been sexually harassed in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. Section 2000e *et. seq.* (JAP 667) Specifically, Kouri alleged that on November 13, 1987, LSI hired her as the Assistant/Secretary to its Director of Personnel, James Todd. That immediately after hiring her, Todd began to unlawfully sexually harass her. Kouri alleged that Todd's acts of sexual harassment included insisting that he escort her to and from the women's bathroom and waiting for her outside of the bathroom; insisting that he escort her to her car each night after work when it was unwanted and there was no apparent danger nor a need for him to do so; sending her numerous unwanted cards and notes expressing his affections for her between November of 1988 and June 10, 1989; insisting that she accept several unwanted gifts from him; buying her flowers, candy, and balloons; placing an embarrassing and unwanted tape recorded message to her on his home answering machine and insisting that she call his home telephone number to listen to the message; making numerous unwanted non-business related telephone calls to her home in the late night and early morning hours; frequently insisting on unwanted touching of her body which consisted of massaging her shoulders and rubbing her hands, feet, and shoulders; insisting on driving her home when specifically requested not to do so; requesting an unwanted date; entering her home and her bedroom when specifically requested not to do so; refusing to leave her home when requested to do so; insisting on buying and bringing her lunch at her home and remaining in her home when not wanted; placing his body extremely close to her so as to interfere with her use and enjoyment of the space around her; refusing to permit her to have casual social contact with other male co-workers;

accusing her of having an affair with a black male co-worker; making several demands that she meet him at a nearby hotel allegedly to discuss business related matters and not doing so; making numerous unwanted visits to her hospital room; climbing on her hospital bed; (JAP 665-668); and giving her unwanted and uncontrolled hugs.

Kouri alleged that Todd increased and continued his unlawful and harassing conduct until she was constructively discharged on June 10, 1988, and suffered a miscarriage on June 24, 1988. She also alleged that LSI retaliated against her for filing a complaint of sexual harassment.

B. Pre-Trial Proceedings

On June 8, 1990, all three defendants filed motions to dismiss the complaint on the grounds that Kouri had failed to plead that she had exhausted her administrative remedies prior to instituting her suit for damages and that the Virginia Workers' Compensation Act was Kouri's exclusive remedy for prosecuting her state common law tort claims. (JAP B) Todd included in his motion to dismiss a request that the complaint be dismissed against him because he was not an employer within the meaning of Title VII. On July 6, 1990, the District Court, after conducting a hearing on the merits, ordered that Todd's motion to dismiss for failure to exhaust administrative remedies be held in abeyance, pending additional briefs by the parties; (JAP B) dismissal of Kouri's state common law claims against all parties; (JAP 437) and it denied the motions to dismiss for failure to exhaust administrative remedies of LSI and Administrative Control Services, Inc. (JAP B) Thereafter, on July 20, 1990, Administrative Control Services, Inc. was dismissed as a party through an agreement of the parties.[1] On

1. LSI stipulated that while Administrative Control Services, Inc.'s name appeared on Kouri's payroll check, she was employed by LSI and that LSI was the true party in interest, not Administrative Control Services.

August 1, 1991, Kouri appealed the decision of the District Court dismissing her state common law tort claims. (JAP C)[2]

On August 22, 1990, the court denied Todd's motion to dismiss Kouri's complaint for failure to exhaust administrative remedies but did not resolve Todd's claim that he was not an employer within the meaning of Title VII. The court extended additional time to Kouri to provide further response to Todd's motion to dismiss before it ruled. (JAP C) Thereafter, on September 5, 1990, through agreement between Todd and Kouri, Count I of Kouri's complaint was dismissed against Todd and he remained in the case for purposes of Count II, III, and IV of the appeal.[3] (JAP C) On November 14 and 16, 1990, Kouri's Title VII claim was tried against LSI only and on February 6, 1991, the District court entered judgement in favor of LSI (JAP 417-436) and the Court of Appeals for the Fourth Circuit affirmed that decision on April 13, 1992.

C. Statement of Facts

Karen Kouri moved to Reston, Virginia in October 1987 (JAP 92) from Katy, Texas[4] after the oil and gas industry collapsed. As a result of the collapse of the oil and gas industry in Texas, Kouri's husband lost his job and was unemployed for a period of time. (JAP 92-93) During this period, Kouri became the primary bread winner of the family and remained so until her husband obtained employment in Fairfax County, Virginia and the family moved to Reston, Virginia. Upon her arrival in Reston, Virginia, Kouri sought immediate employment to aid in the family's immediate financial need. To help meet the family's financial need, Kouri applied and

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2. On September 27, 1990, the Court of Appeals for the Fourth Circuit dismissed Kouri's Appeal of the District Court's decision dismissing counts II, III and IV.

3. To the extent that the District Court's opinion of February 6, 1991, suggests that James Todd was dismissed from the entire case, it is in error. The state common law tort claims were not dismissed against Todd.

4. Katy, Texas is located near Houston, Texas.

was hired as a Secretary/Assistant in the personnel department of LSI, the month after her arrival in Reston, Virginia.

LSI has it primary place of business in Reston, Virginia. It employs approximately eighty to one hundred employees and its primary business function is to serve as a correspondent for the International Trust Company of Liberia and to perform work in the area of maritime administration. (JAP 418)

Kouri learned of the Secretary/Assistant position from an advertisement which appeared in the local newspaper. As instructed by the advertisement, Kouri called LSI and she spoke to James Todd who arranged for her to have an interview with him for the position. (JAP 102) At the time, Todd was the Personnel Director for LSI and he reported solely to the president of LSI, F.T. Lininger.

Kouri's duties, as outlined in the interview with Todd, consisted of being Todd's "right hand person", processing LSI's dental and medical claims, keeping track of Liberian scholarship students in the United States, and any typing that was deemed needed. (JAP 103) During Kouri's interview, Todd also outlined additional duties which he hoped Kouri would be able to assume so he would be free to work on the Merchant's Examination System. The additional work was to include keeping track of employee absences, vacations, six month and year anniversary dates of employment, temporary employees, as well as doing the initial screening of clerical and support personnel. (JAP 105)

After the interview, Todd offered Kouri the position and she accepted. Todd was Kouri's direct and sole supervisor throughout the entire period of time that she was employed by LSI. (JAP 45-46)

In addition to Kouri, Todd had an assistant, Hollis Stephens, but Todd was Kouri's sole and immediate supervisor throughout her employment with LSI. (JAP 332) However, Kouri testified that during the interview, Todd told her that they would have to have a "very tight-working relationship because it was just the two of [them]" (JAP 107)

Consistent with that statement Todd later told Kouri during the first week of her employment that he had to protect her. (JAP 107) Shortly thereafter, Todd embarked upon a protective policy of minimizing Kouri's contact with other LSI employees. Kouri testified that beginning the very first day of her employment with LSI and continuing throughout most of her time with the company, Todd insisted on walking her to her car after work (JAP 110), despite the fact that he parked no where near her (JAP 111) and despite the fact that she had asked him not to do so. (JAP 112) It was during this same period that Todd also began insisting upon escorting Kouri to the women's bathroom and standing guard at the door while she remained inside. (JAP 111-112, 153)

At the end of Kouri's first week of employment, Todd extended and she accepted an invitation to meet after work at a nearby bar (e.g. the Sheraton Hotel) to "discuss some matters". (JAP 419) Although the conversation began in a business-like manner, it quickly turned to a discussion of personal matters. (JAP 419-420) Kouri testified that at some point during the second week of employment, when she had trouble wearing her wedding band because of fluid retention, Todd "would tap [her] finger and say you know what Freud would say about that . . . you really don't want to be married." (JAP 144)

Kouri testified that during the first week of her employment, Todd told her that there were several male employees with whom she was not to have any contact. (JAP 107) Particularly, Todd told her not to speak with the mail clerk, a young white male in his twenties. (JAP 109) When Kouri was seen by Todd talking to the mail clerk, after he had advised her not to, Todd went so far as to threaten Kouri that if the conversations with the mail clerk did not cease he would fire the mail clerk. (JAP 109-110) This conversation occurred while Todd walked Kouri to her car. Kouri also testified that a month or so after she began work, she was seen by Todd having a friendly conversation with a black male employee.

After the conversation, Todd cautioned her not to associate with the black male because he was black (JAP 116) and because he had a reputation of trying to date and seduce white women.[5] (JAP 117)

At the same time that Todd began the practice of threatening Kouri not to have contact with other male employees, Kouri testified that he also begin insisting that he and Kouri discuss business outside of the office, in particular at the bar of the Sheraton Hotel, next door to LSI. (JAP 117-118) Kouri's husband testified that Kouri called him on a number of occasions and told him that Todd insisted on her going over to the Sheraton for a drink. (JAP 259) Likewise, Todd testified that while he did not drink and he had never gone to the Sheraton Hotel with any other employee he did invite Kouri to go on a few occasions. (JAP 356) Kouri testified that Todd would tell her that the purpose of the meetings at the Sheraton Hotel were to discuss her future with LSI. She further testified that, while the conversations started out dealing with office or business matters, Todd would quickly change the subject to non-business related matters. (JAP 118-121) Within the first month or five weeks of Kouri's employment, she testified that Todd insisted on four such meetings.

Because she was not comfortable and did not like meeting Todd at the Sheraton Hotel, sometime after the fifth week of her employment, Kouri began to refuse Todd's requests to meet him at the Sheraton Hotel. Todd then insisted that she come to his home to discuss business related matters.[6] (JAP 118-121) In this instance, as with the visits to the Sheraton Hotel, Kouri testified about how uncomfortable Todd made her feel when she visited his home; that she "was getting very concerned that Todd was formulating some ideas that [she] was not used to working in any business relationship [she had] never had before." (JAP 122) Bonnie Grosz,

5. Kouri testified that in June of 1988, Todd accused her of having "inappropriate conduct" with this same black male.

6. Todd lived in Reston, Virginia near Kouri's home.

Kouri's neighbor in Reston, testified that Kouri told her on a number of occasions that Todd was "a little too friendly" that "she felt uncomfortable" (JAP 245); that Todd was "bothering her"; and that his "actions were inappropriate." (JAP 248)

Beginning the first week of employment, Todd began a practice of placing himself physically close to Kouri at work. Kouri testified that Todd would stay at her side (JAP 113); he would call her into his office, close the door and have her sit in front of his desk. (JAP 113) Kouri testified that Todd was stuck to her like glue. She testified that "I can't really describe it anymore than that." (JAP 122) Karie Gladstone worked summers and Christmas breaks for LSI while a student at the University of Virginia and she had a clear view of Kouri's office during the time she was employed with LSI (JAP 328) Gladstone confirmed Todd's unwanted interference with Kouri's space. She testified that "often when Todd would go in to talk to [Kouri], he would close the door. If Karen was sitting at her desk, he would often come up behind her and come down very low to her face and talk to her so that if she were to move . . . she'd probably touch him. She usually sat real rigid and did her work and listened to him . . . I mean, he often would do it when he went in the office. I can't say how many, but it would be fairly frequent." (JAP 323)

By the second week, Kouri had become very uncomfortable with the constant attention and physical proximity of Todd. (JAP 113) To get Todd to stop, Kouri had her husband come in to the office for the sole purpose of having Todd see her husband and see that they were happily married. During this visit, whenever Kouri's husband touched Kouri, Todd would dart his eyes from left to right. (JAP 144-145) Kouri's husband testified that: "I thought it rather strange that if she ever took my arm or we held hands or anything, he'd look at us, he'd look at our arms or hands touching. And he just would not let us be alone during the lunch hour." (JAP 262)

Not only did Todd insist on being physically near Kouri in the office, he also tried to be with her outside the office as well. Kouri testified that shortly after Todd was told to back off, that he was making her uncomfortable, he invited himself to accompany her to a mall to do Christmas shopping. Todd claimed that his car was broken. Kouri testified that while accompanying her to and from the mall, Todd did not shop at all. (JAP 123) In April of 1988, Kouri testified that in addition to all the cards, notes, and letters Todd was giving her, he made his first request for a date. (JAP 168)

On at least two occasions when Kouri became ill at the office, Todd insisted upon driving her home, "despite her request that he not do so and her statement that she was perfectly capable of doing so herself." (JAP 420) Kouri testified that in April 1988, when she became ill at work she called her husband to take her home, but Todd insisted on driving her home in her car. When they arrived at her home, rather than just dropping her off at her door, as she requested, Todd ignored her pleas and told her he was taking her into her home to make sure she was O.K. At that time, Kouri was in severe pain and could do anything to stop Todd. While in her home, Todd even followed her upstairs to her bedroom in spite of her request that he not do so. Kouri testified that when they arrived in her bedroom she again requested that he leave. Instead of leaving, Todd seated himself on the edge of Kouri's bed and began murmuring to her. Todd did not leave her bedroom until Kouri's husband arrived. At which time, he scampered out of the door. (JAP 163) Todd confirmed that he went into Kouri's bedroom after she requested that he not and that he left when her husband arrived. According to Todd, Kouri then said, fine, . . . thank you, . . . you can go now but he didn't leave until Kouri's husband arrived. (JAP 368)

Kouri's husband gave Todd a ride back to the office. During the ride to the office, Kouri's husband testified that Todd asked him if the job was causing Kouri's headache. Kouri's husband testified that he responded: "I said it's not the job,

she loves the job, she loves the work; the problem is your attention to her. We're happily married. You're not going to get anywhere with her, and just lay off of her, is basically what I said." (JAP 266)

Several days later, Kouri became ill at work again and to avoid Todd, she asked a male co-worker, Hollis Stephens to drive her home. The male co-worker and Kouri were leaving the elevator when they ran into Todd in the garage. Upon being advised of the situation and Kouri's illness, Todd wrestled Kouri's brief case away from Stephens and instructed him to leave. He advised Stephens that he would take Kouri home. Todd testified that although Kouri asked him not to take her home, he again insisted on driving her home because Kouri was his secretary. (JAP 369) Once again when Kouri arrived home, she again requested that Todd not enter her home but he declined her request. As a result, Kouri only went as far as her living room and laid down on her couch and she placed a bowl beside the couch. She testified that Todd was "rubbing [her] and patting [her] and stroking [her] and saying, ok, baby I'm so sorry I did this to you; I'm so sorry I put you under all this stress, and he is repeating this." (JAP 163-164)

Todd testified that in all the years that he had worked for LSI, he had on one occasion given one secretary several roses and he had taken another secretary out to lunch once for Secretary's Week. (JAP 156-157) But beginning the second or third week of Kouri's employment with LSI, Todd began a practice of buying her presents and cards and leaving notes on her desk. (JAP 114, 449-491) Between the beginning date of Kouri's employment and the date of her resignation, Todd sent and gave Kouri in excess of forty-two sentimental cards and notes. (JAP 449) Kouri showed many of the notes and cards she received from Todd to Bonnie Grosz. Grosz, while saying that she couldn't remember the exact words on the cards and notes she saw, since it had been two and a half to three years ago, testified as to the tone of the card and notes

she saw. According to Grosz, "the notes were in my opinion, . . . friendlier than they should be. They would make a lot of personal references that from a supervisor, I guess a supervisor at work would not make to someone who was working for them or to a fellow employee." (JAP 246-247)

Apparently not satisfied giving the cards and notes, Todd, began giving Kouri gifts. The first gift Todd gave Kouri was a key ring with her name on it. Kouri testified that she told Todd that the gift was not necessary; that what she had worked fine; but that Todd insisted that she accept it. (JAP 114) At Christmas time, Todd gave Kouri a sterling silver key chain from Tiffany's. (JAP 114) Todd testified that he had never given any other secretary a Christmas present before Kouri. (JAP 356) Todd testified that other gifts he gave Kouri included a can of cookies, a balloon and a sandwich on Valentine's Day and a set of crystal dogs. He further testified that he did not and had not previously sent Valentines cards or gifts to any other employees. (JAP 396) During Secretary's Week of 1988, Kouri testified that she received numerous cards and notes from Todd. (JAP 488) Plaintiff's exhibit No. 34, which reads "Happy No. 4 day in your week. What's in store for you today? Fun, excitement, intrigue, romance, who knows, have a good one." is an example of the type of cards and notes Todd sent Kouri during Secretary's Week. Todd's practice of leaving little post-it yellow notes began the second day of Kouri's employment. (JAP 128) Kouri testified that this practice of Todd continued even though she "thought [that she] had gotten through to him that [she] did not want any kind of a relationship other than this working relationship." (JAP 129)

To further his unwanted affection and efforts in pursuit of Kouri, Todd began a practice of leaving Kouri photocopies of what he called a Farouk award. (JAP 130) Both Kouri and Todd testified that these awards were meant by Todd to stand for hugs. (JAP 131) Kouri testified, reading from plaintiff's Exhibit 1: "He states it right on the piece of paper, that only

between you and I, a chain hug, and he goes on to say that I can have a hug whenever I want, and he would give me mental hugs as he called then by giving me photocopies which is on the next page, these dogs, he had xeroxed, I don't know how many copies, and occasionally I would have just a dog and no words written on it. . .'' Kouri testified that Todd followed through with his Farouk awards by hugging her. (JAP 131) She further testified that the first time he hugged her occurred on her second day home from the hospital recuperating from her back surgery; that she was at home when Todd called her and requested to come over; that she told him that he needn't come over to visit her; and that he insisted. He came over and when he was leaving he ''reached around and hugged me, and I thought I was going to pass out.'' (JAP 132) This hug caused Kouri ''intense shooting pain and broke a couple of stitches in her back.'' (JAP 133) She testified that the hug was uninvited and that at the time she told Todd: ''Jesus, let go of me.'' (JAP 133) Later that spring, when Kouri went to the airport to pick Todd up at his request, she testified that when they met, he hugged her tightly and tried to kiss her but she managed to avoid him by turning her body (JAP 421) Kouri testified that: ''I just pushed him back.'' (JAP 134) Todd testified that, while he had never hugged any other employee of LSI, (JAP 396) he had hugged Kouri ''on about four occasions.'' (JAP 375) He further testified that with regard to the Farouk award, if Kouri needed a hug, he was available. (JAP 376)

In the winter of 1988 Kouri entered the hospital on a number of occasions for tests and subsequent back surgery to correct a slipped disc. Kouri testified that she was so ill during her first hospitalization that not even her husband visited her. Her second hospitalization lasted nine days. Kouri testified that during each of her stays in the hospital, Todd would make unwanted telephone calls to her from the hospital lobby and ask to come up; that he bought her unwanted cards, flowers, and gifts expressing his affection for her. According to Kouri's testimony, Todd called and he visited her six or seven times

and on each occasion he was an unwanted visitor. (JAP 126, 421) Kouri further testified that on one of his visits he "grabbed" her hand, started rubbing it, and rubbed it so hard that he "rubbed the skin off." At the time, Kouri testified that "and I am trying to say, don't do that, quit it please, and I am pulling my hand back. And he keeps grabbing my hand." (JAP 134-135) Todd, Kouri testified, then started rubbing her feet and legs. (JAP 135) Upon her return to work, Kouri complained to Stephens about Todd's unwanted visits to the hospital, but he was not in any position to take any action. (JAP 344-345) Todd did not discuss business matters with Kouri during any of his visits to the hospital.

Karen Hutchinson was Kouri's hospital roommate in January of 1988. She testified that Todd visited Kouri on three or four occasions between the Thursday and Sunday while she was Kouri's roommate. (JAP 281) Hutchinson testified that Kouri told her at one point that if Todd called, she did not want to speak with him. (JAP 283) Hutchinson testified that Todd was behaving as if he were a very close, intimate person to Kouri. He would bring her cards and notes that were of a very intimate nature. He would sit on Kouri's bed. (JAP 283-284) Hutchinson testified that Todd took the one armed dining table away and . . . "tried to sit on the bed right practically on top of her, at her waist." Kouri was "propped up on pillows, and she was trying to more or less stay away from him, and said several times, please don't do that, please don't touch me." (JAP 285) She heard Kouri say "please don't do that, please. It hurts, please don't touch me. . ." (JAP 284) At another point Hutchinson testified: " I remember specifically at one point he said to her when she asked him to get off the bed, he said to her: But I just want to touch you." (JAP 287) Hutchinson confirmed that Todd tried to hold Kouri's hand and that "[Kouri] would withdraw it and keep it under the covers away from him." According to Hutchinson, Kouri appeared to be very uncomfortable. . . (JAP 285) Hutchinson testified that when Kouri refused to

take telephone calls from Todd he pretended to be Kouri's ex-husband. (JAP 283)

Regarding the cards, Hutchinson testified that Todd brought Kouri cards while she was in the hospital and that "when I first saw them, I thought they were terribly unusual for a person to give to a secretary or an employee. They were very intimate, very loving. One said I love you, and I thought this was very strange for a boss to give a secretary . . . I know that they were from him because I watched him walk in with them and give them to her. They were just very intimate." (JAP 286)

Todd's uninvited and unwelcome touching of Kouri did not cease once she left the hospital. Kouri testified that beginning in March of 1988, after she returned to the office following her back surgery, Todd, on at least three occasions, would "jump up and run around" and began rubbing her shoulders, causing her pain. She would tell him he didn't need to rub her shoulders; he would continue. She would tell him "no, this is not necessary;" he would continue. She testified that she put up her hand; told him that he was hurting her; told him "no" and finally "he says okay, and . . . quits." (JAP 136) Todd testified that he never gave back rubs to any of LSI's other employee. (JAP 396) Not only did he rub Kouri's back, but he also sent Kouri cards and notes offering his back rubbing services. For example see Plaintiff's Exhibit 23, where Todd states, "Hi, missed you *but* I understand; Back-rub!" (JAP 477) The evidence of Todd's unwanted touching was so overwhelming that it caused the District Court to note that Todd "became more physical and intruding . . . , either administering frequent back rubs or placing himself uncomfortably close to the Plaintiff . . . and positioning his face fairly close to hers." (JAP 423-424) Todd repeatedly peppered her with notes and cards variously thanking her for her kind friendship complimenting her on her much appreciated attributes. (JAP 423)

It was about this point in time that Kouri became highly concerned about Todd's conduct and her inability to stop his

unwanted harassment. As a result, Kouri and her husband concocted a new strategy to encourage Todd to stop his unwanted attention. Kouri and her husband invited Todd to dinner at their home where they showed each other extra affection, so as to show Todd that they were happily married. (JAP 424) Next, Kouri's husband dropped by Kouri's office for lunch, but "Todd acted as though he did not want the two of them to get out of the office alone, so he took Kouri's husband on an hour long, meaningless tour of the office." (JAP 424) Kouri's husband next sent her a large bouquet of red roses, which Todd insisted that Kouri remove from her desk because they were a "distraction". (JAP 424)

In May, Kouri's concerns heighten and it became more evident to her that Todd would not stop and that something drastic had to be done. So, on May 10, 1988 Kouri, in a state of emotional distress, called the office of the president of LSI and requested to speak to the President, F.T. Lininger. Kouri was told by the secretary who answered the telephone, that Lininger was not in the office at that time, but she could speak to the Vice President, James McGuire. Kouri informed the secretary that she wished to speak to McGuire. When she spoke to McGuire she "explained that Todd's attention towards her were way beyond that of an employer and an employee, that they were of a personal nature, and I was quite concerned about it." (JAP 143-151) She went on to tell McGuire that there were rumors about Todd and her, and she was very concerned. . . "when he said, well, what are your concerns. Can you be more specific? And I said his attentions towards me are too much, they are too personal and they are unwanted, and I really would like to see the situation taken care of." (JAP 152) Kouri testified that McGuire suggested that she go back and talk to Todd and try to resolve the matter. (JAP 152) Kouri testified that she followed McGuire's advice and spoke with Todd, telling him that while he thought they had a relationship, there was no relationship; his actions had to stop: no more walking her to the car and the

bathroom; no more getting her coffee or picking up her phone. (JAP 153) Kouri testified that, "this was on May 6. I was sitting in one of the word processing courses . . . and I began to get, like, an anxiety attack. I started just shaking, I started sweating, I got just really upset because I realized that I could not take this any longer, that Mr. Todd was not getting the idea." (JAP 151)

Following her conversations with McGuire and Todd, Kouri testified that Todd "began to retaliate against her. He was pulling rank, was being very clip and short and almost to the point of nasty." (JAP 154) Kouri testified to a list of incidents evidencing Todd's change in attitude toward her: 1) Todd would make it difficult for her to work late, claiming a company policy would not allow women to work after hours by themselves, then he would leave so she could not work. Later she found there was no such policy. 2) Todd, without notifying Kouri, changed their established pattern of recruitment, screening, and interviewing. Kouri's role had been to handle everything including the initial interview, and make a recommendation to Todd. Todd would then talk to the person for a few minutes. After the May 6th meeting, Kouri continued the normal practice. She learned that Todd had gone ahead and filled a particular position in the morning, did not tell her, and she spent the whole day working on finding a person for that position. (JAP 156); 3) Todd insisted that Kouri get off a very important business phone call and when she called and asked him what was so important he responded that they needed to discuss her future. (JAP 157)

Three months later, Todd insisted that Kouri meet him at the Sheraton Hotel to discuss his recommendation for her promotion or salary increase. Kouri testified that when they got in the elevator to go to the Sheraton Hotel, he "slipped his arm around my shoulder . . . and I moved away from him." (JAP 137-138) Finally, Kouri testified that she could not take any more after Todd showed her his recommendation for her promotion, but told her she would not receive it until she

stopped her inappropriate conduct. When they arrived at the Sheraton Hotel, Todd began patting her hands. (JAP 138) Thereafter, Todd gave Kouri a copy of his recommendation for her promotion and told her that he was willing to make sure that she was compensated, but, however, he was not going to be made a fool out of (JAP 138-139) and there was something he had to clear up first. (JAP 138) Todd then asked Kouri if she new what ''nigger knocking'' was. He then proceeded to explain that when he was in school in Louisiana, that was the term they used to describe the harassment of black men who had relationships with white females. (JAP 140-141) After he finished his explanation, he proceeded to accuse Kouri of having an inappropriate relationship with a black male co-worker. (JAP 141) The next day, June 9, 1988, Kouri resigned. Todd confirmed much of Kouri's testimony.

On June 11, 1988, Kouri filed a complaint with the Equal Employment Opportunity Commission in which she alleged that she had been sexually harassed. After discussions between LSI, Kouri and her husband, about resolution of her complaint, LSI in a letter dated August 1, 1988 offered to reinstate Kouri to employment in a new position[7] entitled ''Senior Secretary in the Investigative Division,'' but to withhold the decision on the recommendation for her six months review promotion (JAP 497-498) while her new supervisor performed an evaluation of her performance. According to the letter, the decision on her promotion would not be made for thirty days. As an explanation for withholding the promotion, the letter stated that ''It would, we feel, be entirely inappropriate in view of the charges you have made for the company to rely upon the evaluation prepared by

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7. Kouri did not accept the position offered by LSI because it was not comparable to the position she held and because the promotion she was recommended for by Todd was withheld because of her charge of sexual harassment. The position offered was clerical in nature and offered no promotion potential or advancement. Kouri's prior duties were more administrative in nature and lead to a non-secretarial position. (JAP 492-493) The position offered by LSI has never been filled.

Mr. Todd." (JAP 498) In his testimony on this issue, after testifying about the results of his investigation into Kouri's claim of sexual harassment and his findings that the charges were not substantiated, Frank Wiswall testified that "in the first place, I found that Mr. Todd's evaluation was inconsistent with . . . what had been established during the course of my investigation, and then secondly, she was alleging that Todd was sexually harassing her." (JAP 46)

D. District Court Opinion

In rejecting Kouri's claim that Todd's sexual harassment created a hostile work environment, the District Court found that Todd's behavior towards Kouri was not unwelcome. That Todd did pay extremely close attention to Kouri by, peppering her with little notes, escorting her to the bathroom or to her car, and visiting her both at home and in the hospital. (JAP 430) The court acknowledge that Todd had bestowed a considerable amount of attention on Kouri, but the court concluded, "the plaintiff never made any realistic effort to cut it off." (JAP 430) The court emphasized that although Kouri "continually asked him not to touch her and . . . she attempted to avoid his hugs, it nevertheless seem[ed] certain that her requests were not delivered with any sense of urgency, sincerity, or force." (JAP 430-431) According to the court, each of Kouri's attempts to stop Todd's attentions was "a hopelessly indirect action that delivered an attenuated message." (JAP 431) Furthermore, the court stated, "there was no evidence . . . that [Kouri] ever sat [Todd] down and explained the problem (if, in fact, it was a problem) or made any reasonable serious plea for him to stop—at least not until she spontaneously exploded on May 6, 1989. After that point, Todd backed off entirely and the problem subsided." (JAP 431) The court then added that "it is clear that [Todd] was an extremely delicate and fragile person. Kouri undoubtedly fed off this fragility." (JAP 430)

The court concluded that even if the conduct was unwelcome, it would not be actionable because "it did not have the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that seriously affected [her] psychological well-being." (JAP 431) (citations omitted). The court stated that it was undisputed that Todd tended to shower Kouri with affection and that it was not in dispute that Kouri was undergoing severe stress and depression at the time of her resignation "[a]t best, the evidence demonstrated that Todd lived in something of a fantasy world, like a faithful dog, constantly expressing his affection and hoping to receive more of the same in return." (JAP 432) Additionally, the court noted that Todd never made any explicitly sexual remarks, that put simply, Todd's conduct could not have interfered with a reasonable person's work performance or created an intimidating, hostile or offensive working environment that would have seriously affected a reasonable person's psychological well-being or references and that Kouri acting as a reasonable person could have stopped Todd earlier than she did.

The court also held that even if Kouri had made out a case of sexual harassment, LSI was not liable because it was "never placed on notice of Kouri's allegations." (JAP 432) The district court found first that LSI had no actual notice since "Kouri never . . . sought to complain to [Lininger or] any other persons." (JAP 433)[8] The court then held that the harassment was not so pervasive as to constitute constructive notice. The court also concluded that Todd did not hold "a position of sufficient authority" as to satisfy the respondent superior element of her "hostile environment" claim so as to impute his actions to LSI. (JAP 433)

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8. This finding by the district court is inconsistent with its finding that Kouri called Lininger's office to complain about Todd, Lininger was not in, she spoke to McGuire and she informed him that Todd was showing her too close attention. This fact is not in dispute.

The court also rejected Kouri's "quid pro quo" claim, concluding that Todd was undoubtedly jealous that Kouri socialized with other men in the office, it would have been an extremely incongruous chapter in this story to contend that he demanded sex from her in exchange for a recommendation for promotion. A "quid pro quo" offer was simply not Todd's style. (JAP 434) Finally, the court held that even if it had held LSI liable for sexual harassment, it would have limited back pay only to the period prior to LSI's offer to reemploy Kouri. (JAP 435) According to the court, Todd's promotion recommendation, which had not been approved by the company, did not justify Kouri's rejection of the offer and it was reasonable for the company to demand another one month probationary period.

E. Court of Appeal Opinion

The Court of Appeals affirmed the decision of the District Court on the grounds that Kouri failed to establish that LSI had actual or constructive knowledge of Todd's action and that it therefore could not input liability for hostile environment sexual harassment to LSI. The Court of Appeals also held that Kouri failed to establish "quid pro quo" sexual harassment by her supervisor because Kouri failed to show that Todd requested sexual favors from her in exchange for a favorable recommendation for promotion. The Court of Appeals made no mention or findings regarding Kouri's claim of retaliation.

Reasons For Granting The Writ

A. The Fourth Circuit's Requirement for a Showing of an Explicit Request for Sex is Unrealistic and Outside the Direction of Other Circuits

The Fourth Circuit, in this case, has upheld and affirmed the decision of the district court that in order to prevail on a claim of sexual harassment under the theory of "quid pro quo" sexual harassment, as established in *Meritor Savings Bank,*

FSB v. *Vinson ET AL.*, 477 U.S. 57, 106 S.Ct. 2399, (1986), a party must allege and establish, as part of her *prima facia* case, an explicit request for sex in exchange for an employment benefit. Such a requirement places a very heavy burden on plaintiffs who have been sexually harassed but have not received a proposition for sex. The burden is beyond the standards announced in *Vinson*, as well as unrealistic in a modern day world where people seldom make explicit requests for sex or to sleep with each other. More often than not, parties in the modern day world use their actions to convey their desires and intent for sex. Most "would-be sexual harassers" conduct themselves as Todd did. Maybe not quite to the extent that he did, but certainly it is the extreme and unusual case that will involve an explicit request for sex.

Todd's intent was clear from his actions and Kouri should not be denied the protection of Title VII because there was no explicit request for sex. The nonexistence of an explicit request should not be a barrier to protection against sexual harassment, as is made so by the decision of the Fourth Circuit. If Kouri had been a man, it goes without saying that Todd certainly would not have embarked upon his unwanted course of conduct. He treated Kouri as he did because she is female. Thus, his actions amount to sex discrimination under Title VII.

The Fourth Circuit's requirement for a showing of an explicit request for sex is outside the direction and holdings of other circuits. For example, the Second Circuit in *Camero* v *New York City Housing Authority*, 890 F.2d 569 (2nd Cir. 1989) held that the gravamen of a "quid pro quo" claim of sexual harassment is that a tangible job benefit or privilege is conditioned on an employee's submission to sexual blackmail and that adverse consequences follow from the employee's refusal. *Id.* at 578. In its holding, the Second Circuit specifically rejected the claim by the defendants that sexual harassment had not been proved because the defendants conduct, although not a paradigm of modern inter-gender

work-place relations was comparatively trivial, sporadic and innocuous, and did not involve a proposition or demand for sexual favors or use of force. *Id.* The Second Circuit went on to say that when the defendant (e.g. plaintiff's supervisor) attempted to bestow unasked for and unacceptable kisses upon the plaintiff he made propositions of sexual activity that was actionable under Title VII. *Id.*

The Third Circuit in *Andrews* v. *City of Philadelphia*, 895 F.2d 1469 (3rd Cir, 1990) when faced with this issue held that "to make out a case under Title VII it is necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff had been a man she would not have been treated in the same manner." *Id.* at 1485. The court said, "To constitute impermissible discrimination, the offensive conduct is not necessarily required to include sexual overtones in every instance or that each incident be sufficiently severe to detrimentally affect a female employee." In its wisdom, the Third Circuit went on to hold that "intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances." Although the Third Circuit's attention in *Andrews* was focused on a claim involving the theory of hostile work environment, it seems clear from the court's use of language in *Andrews* that it would not require an explicit request for sex to find a violation of Title VII under the theory of "quid pro quo" sexual harassment.

The Eleventh Circuit in *Henson* v. *Dundee*, 682 F.2d 897 (11th Cir., 1982) held that to establish "quid pro quo" sexual harassment a plaintiff must show: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; and (4) the employee's reaction to harassment complained of affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment. The acceptance or rejection of the harassment by an employee must be on expressed or implied condition to the receipt of a

job benefit or the cause of a tangible job detriment in order to create liability under this theory ["quid pro quo"] sexual harassment. *Id.* at 909. This standard is more realistic than that used by the Fourth Circuit and it allows for the full range of protection granted under Title VII. The standard used by the Fourth Circuit allows for sexual harassing conduct which is not accompanied by an explicit request for sexual favors to go unprotected.

In *Sowers* v. *Kemira, Inc.*, 701 F Supp 809 (S.D. Ga., 1988) the District Court for the Southern District of Georgia found sexual harassment where the employee made an inquiry about her promotion and her supervisor told her that if she played his game she would get what she wanted. *Id.* at 823 In *Boyd* v. *Hayes Living Health Care Agency*, 44 FEP Cases 33 (W.D. Tn, 1987), the District Court for the Western District of Tennessee held that a female employee was subject to sexual harassment by the employer's administrator even though he did not explicitly invite her to enter into a sexual relationship with him or force one on her, where his conduct was sexual in nature in that he insisted that the employee come to his hotel room, he offered her wine, he tried to get her to look at a sexually explicit movie, he attempted to restrain her departure and he slammed the door in anger after she left. To determine whether the conduct of the defendant was sexual in nature, the court looked to the overall circumstance. *Id.* at 340. This same thoughtful analysis should have been applied by the Fourth Circuit to Kouri's case.

Lastly, in *Coley* v. *Consolidated Rail Corp.*, 561 F Supp 645 (E.D. Mi, 1982), the Eastern District of Michigan found "quid pro quo" sexual harassment where the supervisor made no explicit request for sex, but he made references to the size of the employee's "boobs," kept track of her menstrual periods on his office calendar and made remarks about her moods in relation thereto, and repeatedly inquired as to when the employee was going to do something nice for him. *Id.* at 647. The supervisor also began to count down the days which the

employee had left to do something nice or he would stop being nice and start to get mean. *Id.*

There is very little difference between the facts set forth in the aforementioned cases and Kouri's case. In some ways, her facts are worse. But the true difference lies in the fact that her case was tried in the Fourth Circuit which requires as part of the prima *facie case* a showing that there was an explicit request for sex in order to establish liability. That standard should not be permitted to stand.

B. The Fourth Circuit Erred When it Failed to Address Kouri's Claim of Retaliation

The Fourth Circuit erred when it failed to address Kouri's claim of retaliation. Section 703 (4)(a) of Title VII of the Civil Rights Act of 1964 prohibits employers from taking retaliatory action against an employee because she filed a complaint of sexual harassment. The language of Section 703 is clear. The Fourth Circuit, however, chose to ignore Kouri's right. It is well settled that to establish her claim of retaliation, Kouri only had to show that she engaged in protected activity; LSI took an action that disadvantaged her; and there is a causal connection between the first two elements. *Hochstadt* v. *Worcester Foundation for Experimental Biology,* 425 F Supp. 318, 324 (D. Mass, 1976) Aff'd 545 F.2d 222 (1st Cir. 1976) In Kouri's case, each element was met. The evidence of the retaliation was very clear. The letter to Kouri from LSI said we offer you reinstatement to a new position but in light of your charge of sexual harassment, we can not consider you for promotion for thirty days. The district court said this was reasonable and the Court of Appeals did not address the issue. The issue is not whether LSI's actions were reasonable, but the basis for it action. LSI's letter says that it took the action because of the charges of sexual harassment brought by Kouri. Such reasoning clearly violates Section 703.

C. LSI Should Be Held Liable for Todd's Sexual Harassment of Kouri

LSI should be held liable for Todd's acts of sexual harassment of Kouri because he was Kouri's immediate and sole supervisor and he had authority to make employment decisions which affected Kouri's terms and conditions of employment. *Boyd* v. *Hayes Living Health Care Agency, Supra.*, at 341. Todd used the means furnished to him by LSI to accomplish his sexual harassment of Kouri. *Coley* v. *Consolidated Rail Corp., Supra.* at 650 Without the authority granted to him by LSI he could not have done the things he did to Kouri. The fact that he was not the ultimate decision maker on Kouri's promotion is not truly relevant because LSI granted him initial authority which allowed him to have great influence over whether Kouri received a promotion or remained an employee with LSI. Todd had authority to even delay the promotion if he chose. His powers over Kouri combined with his unwelcome advances gave him a coercive edge over Kouri which could not have existed without LSI's grant of power to him. When Todd threaten to fire the mail clerk if she did not stop talking to him and when he told her he would not recommend her for promotion if she continued her alleged inappropriate conduct with the black male employee, he was exercising the power of economic coercion granted to him by LSI. Hence, LSI should be held liable for the actions of its servant.

CONCLUSION

For the reasons set forth above, this Court should grant the petition and review the decision below.

Respectfully submitted,

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ATTORNEY FOR THE PETITIONER,
KAREN L. KOURI

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2165

KAREN L. KOURI,

Plaintiff-Appellant,

Versus

JAMES N. TODD; LIBERIAN SERVICES, INCORPORATED,

Defendants-Appellees.

And

ADMINISTRATIVE CONTROL SERVICES, INCORPORATED,

Defendant.

ORDER

Appellee James Todd and appellee Liberian Service, Inc. have filed motions to dismiss this appeal. Appellant has filed a response to the motions to dismiss.

The Court grants the motions to dismiss, with costs to appellees in this case.

Entered at the direction of Judge Hall with the concurrence of Judge Widener and Judge Sprouse.

For the Court

JOHN M. GREACEN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2165

KOURI v. TODD

MANDATE

The order of this court dated 9/27/90 takes effect today.

JOHN M. GREACEN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

KAREN L. KOURI,
Plaintiff,
v.
JAMES N. TODD; LIBERIAN SERVICES, INC. and ADMINISTRATIVE CONTROL SERVICES, INC.
Defendants.

CIVIL ACTION NO. 90-0582

ORDER

BY AGREEMENT of the undersigned counsel, as evidenced by their signatures hereto, Plaintiff's claim under Title VII, Count I of her Complaint, shall be and hereby is dismissed with prejudice against Defendant James N. Todd.

ENTERED this 5th day of September, 1990.

JUDGE, United States District Court

SEEN AND AGREED:

Philip J. Hirschkop, Esquire
HIRSCHKOP & ASSOCIATES, P.C.
108 North Columbus Street
Post Office Box 1417-A49
Alexandria, Virginia 22313
Counsel for Defendant James N. Todd

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Alexandria, Virginia 22312
Counsel for Plaintiff Karen L. Kouri

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KAREN L. KOURI,
Plaintiff-Appellant,
v.
JAMES N. TODD; LIBERIAN SERVICES, INCORPORATED; ADMINISTRATIVE CONTROL SERVICES, INCORPORATED,
Defendants-Appellees,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Amicus Curiae.

No. 91-2343

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, Chief District Judge.
(CA-90-582-A)

Argued: December 5, 1991

Decided: April 13, 1992

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, HALL, Circuit Judge, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Jessie James, Jr., Clifton, Virginia, for Appellant, Jennifer S. Goldstein, Office of General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae, Julia Bougie Judkins, LEWIS, TRICHILO & BANCROFT, P.C., Fairfax, Virginia, for Appellees. **ON BRIEF:** Donald R. Livingston, Acting

General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Office of General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Karen L. Kouri sued Liberian Services, Inc. (LSI) and James N. Todd, alleging that Todd sexually harassed her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq* and Virginia common law.

Kouri dismissed her Title VII claim against Todd. Following a trial against LSI, the district court found that LSI did not know of Todd's actions and hence was not liable to Kouri. The district court ruled that the Virginia Workers' Compensation Act barred the state law claims. We affirm.

I

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employement, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII provides relief for both sexual harassment resulting from a hostile or offensive working environment and *quid pro quo* sexual harassment. *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 66-68 (1986); *Katz v. Dole,* 709 F.2d 251, 254 (4th Cir. 1983).

Because Kouri dismissed her Title VII claim against Todd, we need only address whether LSI can be held liable. In order to hold LSI liable for hostile environment sexual harassment, Kouri must prove not only that Todd sexually harassed her,

but also that LSI had actual or constructive knowledge of Todd's actions. *Katz,* 709 F.2d at 255; *Swentek v. USAIR, Inc.*, 830 F.2d 552, 558 (4th Cir. 1987). She may prove LSI's knowledge by showing that "complaints about the harassment were lodged with the employer or that the harassment was so pervasive that employer awareness may be inferred." *Katz,* 709 F.2d at 255.

Kouri has not met this burden. The district court noted that no testimony disclosed that other LSI employees were aware of Todd's conduct. Accordingly, the court concluded that there is no reason why LSI should have known about it.

Kouri testified that she told James McGuire, a vice president, that rumors existed about her and Todd, that Todd was paying too much attention to her, and that this attention was unwanted and too personal. She confronted Todd after McGuire suggested she speak to him. Kouri claims she did not speak to McGuire again.

McGuire testified that Kouri said she could not stand the tension and constant attention of Todd. McGuire says he told her to compose herself and come in Monday morning, and he would arrange for her to see the company's president. McGuire claims he concluded that Todd was overworking Kouri. About an hour later, according to McGuire's testimony, his secretary told him that Todd, Kouri, and Kouri's husband were in Todd's office. McGuire testified that later Kouri stopped by his office and told him the matter had been resolved. The district court credited McGuire's testimony over Kouri's, and found that LSI did not know or have reason to know of Todd's actions.

We may not overrule a trial court's finding of fact unless it is clearly erroneous. Fed. R. Civ. P. 52(a); *Pullman-Standard v. Swint,* 456 U.S. 273, 287 (1982). "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings. . . ." *Anderson v. Bessemer City,* 470 U.S. 564, 575 (1985). Therefore, we cannot impute liability for hostile environment sexual harassment to LSI. Because we cannot impute liability to LSI, we decline to address Kouri's claim that the

district court erred in finding no hostile environment sexual harassment.

Kouri next contends that she suffered *quid pro quo* sexual harassment. Employers are strictly liable for *quid pro quo* sexual harassment by supervisors. *Katz,* 709 F.2d at 255 n.6. We have noted that *quid pro quo* sexual harassment is "harassment in which a supervisor demands sexual consideration in exchange for job benefits." *Katz,* 709 F.2d at 254 (*citing Henson v. City of Dundee,* 682 F.2d 897, 908 n.18 (11th Cir. 1982)). Kouri has not shown, however, that Todd requested sexual favors from her in exchange for a favorable recommendation for promotion. Accordingly, Kouri has failed to establish a claim of *quid pro quo* sexual harassment.

II

In her brief, Kouri frames the state law issue as follows: "The issue presented here is whether the court should apply the law as it existed prior to July 1, 1988, or should it apply the law as it was amended on July 1, 1988." Br. at 40. With respect to actions filed before July 1, 1988, the Virginia Supreme Court has held that trial courts lack subject-matter jurisdiction over employees' complaints of sexual harassment. The Workmens' Compensation Act, administered by the Workmens' Compensation Commission, provides the exclusive remedy. *Kelly v. First Virginia Bank-Southwest,* Va. , 404 S.E.2d 723 (1991); *Haddon v. Metropolitan Life Ins. Co.,* 239 Va. 397, 389 S.E.2d 712 (1990). Parenthetically we note that an earlier case, *City of Richmond v. Braxton,* 230 Va. 161, 335 S.E.2d 259 (1985), lends support to Kouri's claim, but we are obliged to apply the Virginia Supreme Court's most recent expression of Virginia law.

Virginia Code § 65.2-301, effective July 1, 1988, allows victims of sexual assault to pursue an action at law against an attacker as an alternative to seeking relief under the Virginia Workers' Compensation Act. Kouri claims that this statute applies to her case.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

KAREN L. KOURI,
Plaintiff,
v.
LIBERIAN SERVICES, INC.
Defendant.

CIVIL ACTION NO. 90-0582-A

ORDER

In accordance with the accompanying Memorandum Opinion, it is accordingly ORDERED:

(1) that Judgment be, and hereby is, ENTERED in favor of the defendant, Liberian Services, Inc., and against the plaintiff, Karen L. Kouri. Plaintiff's Complaint is DISMISSED with prejudice;

(2) that the Clerk shall forward copies of this Order and the accompanying Memorandum Opinion to all counsel of record.

United States District Judge

February 6, 1991
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

KAREN L. KOURI,
Plaintiff,
v.
LIBERIAN SERVICES, INC.
Defendant.

CIVIL ACTION NO. 90-00582-A

MEMORANDUM OPINION

This matter is before the court on plaintiff Karen L. Kouri's Complaint for Sexual Harassment and Retaliation.[1] For the reasons set forth below, Judgment is entered in favor of defendant Liberian Services, Inc. ("LSI").

I. Findings of Fact

After reviewing the pleadings, evidence, authorities, and arguments of counsel, the court finds as follows:

Plaintiff Karen Kouri joined the employ of LSI in November, 1987 and remained there until her resignation on June 9, 1988. (Testimony of Kouri, Plaintiff's Exb. 42). LSI, with its eighty to one hundred employees, is a correspondent for the International Trust Company of Liberia, and it performs various work in the area of maritime administration. (Testimony of F. T. Lininger and James McGuire).

Kouri made her way to Northern Virginia from Houston, Texas. Previously, she held a number of positions, many in the oil and gas field, ranging from legal secretary to administrative assistant. She completed two years of junior college and has also attended seminars on topics related to her

1. Kouri's state law claims for intentional infliction of emotional distress, assault, and battery were dismissed on July 6, 1990.

On July 20 and September 5, 1990, Administrative Control Services, Inc. and James N. Todd, respectively, were dismissed as party defendants.

past work. (Testimony of Kouri, Plaintiff's Exb. 42). In 1987, James N. Todd, the Director of Personnel at LSI, hired Kouri to work as his secretary.

At the end of Kouri's first week of employment, Todd expressed a desire to discuss some matters, and the two met for a drink after work at the Sheraton next door. (Testimony of Kouri). During the discussion, both opened up about their personal lives: Kouri indicated that she had recently been having problems with her third marriage, that she has less than relished the idea of moving to Northern Virginia, and that, of her two sons, the first was homosexual and the second had been addicted to drugs since he was eight or nine years old. (Testimony of Todd). Todd, still suffering through a recent divorce, empathized, saying that he too had been struggling to raise a fourteen year-old son with a drug habit. (Testimony of Kouri).

Some time thereafter, Todd gave Kouri, as a gift, a key ring with her name engraved upon it. (Testimony of Kouri). Then, he embarked upon a protective policy of minimizing her contact with other LSI employees. He insisted that he personally escort her to the bathroom every time that she felt the need to go, and he always waited on guard outside the door to walk her back to the office. He also ordered her not to speak to another male co-worker on the grounds that personnel department employees were not to socialize with other staffers. Moreover every evening he would walk the plaintiff to her car, despite the lack of need for any particular safety precautions. (Testimony of Kouri).

At Christmas, Todd gave Kouri a Tiffany key ring and received an executive desk calendar in return. (Testimony of Kouri and Todd). On a note that was enclosed with the gift, Kouri wrote:

> I wanted to take this opportunity to tell you how very much I appreciate you and your trust and confidence in me. You have helped immensely in my making a painful transition not quite so painful.

> It is so nice to have you as a boss and as a friend. I am very grateful to you for your patience in helping me to learn this position and my New Year's resolution to you is never to let you down!! I wish you and your family all the *very best.*

(Emphasis in original). (Defendant's Exb. 4).

Kouri experienced some health problems during her tenure with LSI. Twice she was forced to leave work because she suddenly felt ill. On both occasions, Todd insisted on driving her home despite her protestations that she was perfectly capable of doing so herself. (Testimony of Kouri). In the second instance, Kouri had engaged Hollis Stevens, a co-worker, to help her out, but Todd discovered them leaving the elevator together. After learning what was happening, he volunteered his samaritanship, but Stevens declared himself equal to the task. Todd persisted and, after a brief struggle, won the job. (Testimony of Kouri).

Both times, after arriving at the house, Todd ignored the plaintiff's request to leave her at the front door and, instead, walked her all the way into her bedroom. Then, he parked himself on the bed beside her and massaged her hands (although she politely asked him not to) until her husband arrived, at which time he would scurry away before he entered. (Testimony of Kouri).

One time, Kouri volunteered to watch over Todd's apartment while he spent time in California and offered to pick him up upon his return. As promised, she greeted him at the airport, and he then apparently attempted to hug her tightly of give her a kiss, but she managed to avoid it by turning her body. (Testimony of Kouri).

Due to a slipped disc, the plaintiff at least twice had to undergo hospitalization in connection with some surgery on her back. Todd repeatedly called or visited on each of these occasions. One time, he turned up uninvited at her hospital room, bearing flowers, get-well cards, and a glass dog as a gift, then stayed for two to three hours rubbing her hands and

patting her. For part of the stay, he took a seat on her bed, an action which, in light of her sensitive back, caused her serious pain. (Testimony of Kouri and Karen Hutchison). Kouri's hospital roommate, who later became one of her friends, thought that Todd was acting as though he were a close person. (Testimony of Hutchison).

Each time the plaintiff sat home recuperating, Todd would call, insisting that he be permitted to bring her lunch, under the pretext that there were business matters to be discussed. (Testimony of Kouri). During one of these recovery periods, Todd dropped by to visit and suddenly hugged the plaintiff so hard that he broke two of the stitches on her back, Kouri testified that, as a result, she felt as though she was going to pass out. (Testimony of Kouri). After her final hospitalization, Todd began to call, imploring her to return to the office, and, eventually, she agreed to do so, against her physician's orders. (Testimony of Kouri).

Since well before she joined the employ of LSI, the plaintiff has endured a history of medical problems ranging from clinical depression to persistent miscarriages. (Testimony of Kouri). For many years, she has battled severe nightmares, sleeplessness, anxiety, abdominal cramps and debilitating migraine headaches. In October 1985, she terminated a pregnancy after learning that the fetus had chromosomal defects. She has also had at least two (and possibly three) miscarriages and, as noted earlier, two operations to repair an extruded disc in her back. (Testimony of Kouri).

In 1985, her treating physician suggested that she see a psychiatrist to assist her with her various problems. She declined. Then, contemporaneous with her back surgery in January 1988, she was examined by a psychiatrist who determined that a number of factors, including her recent move from Texas, her marital troubles, her two sons, and her current hospitalization, were cumulating to cause her depression. (Testimony of Niranjan Janni). Noting, also, that she had lost a significant amount of weight and was suffering

from decreased energy, he prescribed her additional anti-depressants and advised her to seek further psychotherapy. (Testimony of Janni). At least temporarily heeding that advice, Kouri consulted six or seven different Kaiser Permanente psychiatrists in April 1988. (Testimony of Kouri).

After she returned to work, Todd repeatedly peppered her with noted and cards variously thanking her for her kind friendship and complimenting her on her much appreciated attributes. (Plaintiff's Exbs. 1-37). One day he even left an outgoing message on his answering machine which honored her by expressing his appreciation for her friendship. Much of this activity occurred during Secretaries' Week in late April 1988, and one particularly encouraging note was given to her on Mothers' Day. (Defendant's Exb. 19). None of these notes or messages ever mentioned sex or contained any sexual innuendo. (Testimony of Kouri).

Todd also became more physical and intruding during this period, either administering frequent back rubs or placing himself uncomfortably close to the plaintiff. (Testimony of Kouri). One of Kouri's neighbors, who joined her for lunch one day when Todd came over, believed that he was acting a little too friendly (testimony of Bonnie Grosz); and one of her fellow employees noticed that Todd once entered Kouri's office, closed the door, and positioned his face fairly close to hers. (Testimony of Karie Gladstone). At the same time, however, other employees whose desks were nearby, and whose views to the plaintiff were unobstructed, stated that they noticed no unusual or inappropriate behavior. (Testimony of Deborah Pettit and Hollis Stevens).

At one point, the plaintiff and her husband concocted a plan to show Todd that she was happily married. The scheme involved treating Todd to a series of displays of marital togetherness. Once, the Kouris invited Todd to dinner with the two of them, and another time, the plaintiff's husband dropped by the office for lunch. (Testimony of Karen Kouri

and John Kouri). On the latter occasion, Todd acted as though he didn't want the two of them to get out of the office alone, so he took the plaintiff's husband on an hour long, meaningless tour of the office. (Testimony of Karen Kouri and John Kouri). John Kouri also sent his wife a large bouquet of red roses, which the plaintiff placed on her desk until Todd instructed her to remove them on the grounds that they were a distraction. (Testimony of Kouri).

Kouri eventually heard rumors through the office grapevine that she and Todd were having some sort of relationship. She then confronted Todd with this information, and Todd responded that he told nobody in the office about "[their] relationship." (Testimony of Kouri). The plaintiff finally decided that the situation had gone too far, and, on May 6, 1988, she telephoned F. T. Lininger, the president of the company. Because Lininger was not in, however, she spoke instead to James McGuire, one of the LSI vice-presidents. (Testimony of Kouri and McGuire).

McGuire had a great deal of difficulty determining exactly what was bothering the plaintiff, and he eventually concluded that she was suffering from the frustration of being overworked by her boss. At no time during the conversation did Kouri mention sexual harassment. He then recommended that she set the problem aside until the following Monday morning when Lininger returned, so she could personally discuss the situation with the company president at that time. (Testimony of McGuire).

About one hour later, McGuire was informed that Kouri, her husband, and Todd were all in the office together. Shortly thereafter, Kouri, appearing calm and collected, stopped by McGuire's office to state that her problems with Todd had been totally ironed out. Accordingly, she then asked McGuire to forget about their prior conversation. McGuire did so, although he did report the entire affair to Lininger on the following Monday morning. (Testimony of McGuire).

In the few months following, Todd appeared to be angry and curt with Kouri, and their working atmosphere apparently grew more hostile. Finally, in early June 1988, the situation reached its boiling point: Todd walked into Kouri's office while she was on the phone instructing Greg Lee, a black accountant at the firm, what to bring to a party. When he found out who she was speaking to, he accused her of having an affair with him and promptly launched into a long harangue about inappropriate sexual conduct, describing in great detail what white Louisiana boys used to do to black men caught messing around with their women. (Testimony of Kouri).

Todd then told Kouri that he wished to discuss her future with LSI. He thereupon presented her with a copy of his salary review and recommendations for her promotion, although he covered up the bottom quarter of the memorandum so that she could not see the actual amount of the proposed raise or the title of the new position. (Plaintiff's Exb. 38; Testimony of Kouri). He subsequently submitted the document to Lininger.

The plaintiff, greatly troubled by all of this, went home that day and discussed the situation with her husband. The next morning, she returned to work and issued her resignation. (Testimony of Kouri). Stating that she was "fed up," she handed her keys to Stevens and asked him if he would give them to Todd. Stevens then attempted to elicit the nature of her problem and even offered her a ride home, but Kouri refused to elaborate, and at no time before she left did she make any mention of sexual harassment. (Testimony of Stevens). Later, after hearing the news, Todd refused to accept the resignation, and he spent 20 minutes that afternoon knocking on Kouri's door and ringing her bell. (Testimony of Kouri).

By the time of the resignation on June 9, 1988, Lininger, who had the sole final authority on these matters, had not yet acted on Kouri's salary review because he still had unanswered questions about her absenteeism. (Testimony of Lininger). At

LSI, all new employees went through a three month provisional period and were given both six month and annual salary reviews. (Testimony of Stevens).

By the same token, employees who were experiencing any kind of trouble in the company had the alternative of either taking the problem to the personnel committee or taking advantage of Lininger's open-door policy by coming to speak with him directly. (Testimony of Lininger). At no time, however, did the plaintiff go either of these routes with complaints of sexual harassment, and neither Lininger, McGuire, or Stevens had any knowledge of these allegations until after Kouri resigned from her position. (Testimony of Lininger, McGuire, and Stevens).

In late July 1988, Dr. Frank Wiswall, Vice-Chairman and Chief Counsel for LSI, after conducting a thorough examination of the matter, offered Kouri a new position in the company as a secretary in the Marine Investigations Division. (Deposition of Wiswall). By this point, Todd had already been reassigned to a different division in the firm, and Stevens had been promoted to handle all the relevant personnel work. (Testimony of Lininger).

Wiswall's offer of reinstatement was reduced to writing on August 1, 1988. (Plaintiff's Exb. 40). In it, LSI promised Kouri employment at the same grade, at the same rate of pay, with backpay and benefits retroactive to the date of her resignation. Moreover, the Investigative Division job, under the direct employ of Captain William Chadwick, held more promise for advancement than the plaintiff's prior position. (Testimony of Chadwick). The position involved the investigation of major maritime casualties and required the employee to have a conceptual mind, including the ability to edit, proofread, and format reports and exhibits. Given Kouri's "legal" background, Chadwick decided that the job was ideally suited for her. (Testimony of Chadwick).

Nevertheless, the plaintiff rejected this offer of reinstatement by letter dated August 8, 1988. (Plaintiff's Exb. 39).

Apparently, she determined that the new position would not be comparable to the old one, in light of the favorable recommendation for promotion that Todd gave Lininger in his salary review memorandum. (Plaintiff's Exb. 39). Yet, in a response that Chadwick sent to the plaintiff, it was made clear that Todd's review could not be treated "as a fair reflection of [her] job performance." (Plaintiff's Exb. 41).

Shortly after the plaintiff rejected LSI's offer of reinstatement, she began to work in the personnel department at British Aerospace. Two months later, however, she resigned from the position because her son had been hit by a car in Texas, and because she felt that the job was less than what she had expected it to be. (Testimony of Kouri). Thereafter, she worked very briefly for Temps & Co., and filled in for a friend, transcribing medical reports, at a plastic surgeon's office. (Testimony of Kouri). Her work for the physician was rather haphazard, however, as she frequently called in sick (once she claimed to have strept throat, but showed at the office an hour later) and was generally unreliable as an employee. (Testimony of Sandra Anderson). At the time, she was 7-8 weeks pregnant, and she eventually gave birth in July, 1989. (Testimony of Kouri). The plaintiff claims that, since September 1989, she has without success been sending out her resume and actively seeking employment, although she has not worked since December 1988. (Testimony of Kouri).

II. Legal Analysis

A plaintiff may prove a Title VII violation either by proving that sexual discrimination has created a hostile or abusive working environment or by proving that submission to sexual demands was a condition to obtaining or maintaining a position, or to being promoted from a position presently held. *Meritor Savings v. Vinson,* 477 U.S. 57, 106 S.Ct. 2399 (1986); *Katz v. Dole,* 709 F.2d. 251 (4th Cir. 1983). Kouri tried her case on both these theories.

A

To prevail on a claim of "hostile environment," the plaintiff must show that "the conduct" in question was unwelcome, that the harassment was based on sex, and that the harassment was sufficiently severe or pervasive to create an abusive working environment. *Swentak v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987); *see also Spencer v. General Electric Co.*, 697 F. Supp 204, 217 (E.D.Va 1988), *aff'd*, 894 F.2d 651 (4th Cir. 1990). Moreover, even if these criteria have been met, the plaintiff must also show some basis for imposing liability on the employer. *Id.*

As a starting point in the analysis, the court finds that the harassment in this case was not unwelcome. It is true that Todd paid extremely close attention to the plaintiff by, *inter alia*, peppering her with little notes, escorting her to the bathroom or to her car, and visiting her both at home and in the hospital. Yet, the plaintiff never made any realistic effort to cut it off. Todd was a recent divorcee when Kouri first met him and, given the problems he has had with his son, the substance of many of his notes to the plaintiff, and his overall demeanor, it is clear that he was an extremely delicate and vulnerable person. Kouri undoubtedly fed off of this fragility.

Furthermore, it is also clear that Kouri shared many of her personal problems with Todd. In fact, many of the notes that he wrote to her either reference her various troubles (e.g., her sons) or thank her for her friendship. (See Defendant's Exbs. 19-21). One revealing note that the plaintiff wrote to Todd indicates that she, too, was extremely grateful for his friendship and assistance. (Defendant's Exb. 4).

Most importantly, however, Kouri did not once make a serious demand on Todd to stop paying such close attention to her. She indicated that she continually asked him not to touch her and that she attempted to avoid his hugs, yet it seems certain that her requests were not delivered with any sense of urgency, sincerity, or force. In essence, she was sending out mixed signals.

She spoke at length about her schemes to curtail Todd's behavior, but each of these was a hopelessly indirect action that delivered an attenuated message. She had her husband come to visit or send flowers, or she would invite Todd to dinner so that he could see that she was happily married. There was no evidence, however, that she ever sat him down and explained the problem (if, in fact, it was a problem) or made any reasonably serious plea for him to stop – at least, not until she spontaneously exploded on May 6, 1989. After that point, Todd backed off entirely and the problem subsided.

Yet, even if the harassment was, in fact, unwelcome, the court further finds that it did not have the effect of "unreasonably interfering with the plaintiff's working performance and creating an intimidating, hostile, or offensive working environment that affected seriously [her] psychological well-being." *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619 (6th Cir. 1986), *cert. denied,* 481 U.S. 1041, 107 S.Ct. 1983 (1987); *Spencer,* 697 F. Supp. at 204, 218, *quoting, Highlander v. K.F.C. National Management Co.*, 805 F.2d 644, 650 (6th Cir. 1986).

It is not disputed that Todd tended to shower Kouri with affection, nor is it disputable that Kouri was undergoing severe stress and depression at the time of her resignation. Fatal to her case, however, was her inability to convince the court that the former had caused the latter. At best, the evidence demonstrated that Todd had lived in something of a fantasy world, like a faithful dog, constantly expressing his affection and hoping to receive more of the same in return.

Nowhere in the entire story of this case, however, was there any indication that Todd ever made any explicit or implicit sexual remarks or references. Put simply, Todd's conduct would not have interfered with a reasonable person's work performance or created an intimidating, hostile, or offensive working environment that would have seriously affected a reasonable person's psychological well-being. It plainly did not rise to that level. *See Rabidue*, 805 F.2d at 620; *Spencer*,

697 F.Supp at 218. The plaintiff undoubtedly sought to stick Todd with the blame for all her psychological woes, but evidence of her past medical history seriously confounded that effort. Moreover, as noted earlier, Kouri, acting like any reasonable person, could have stopped him much earlier than she did.

In any event, the court could not properly impose liability on the employer in this case because the record so clearly indicates that LSI was never placed on notice of Kouri's allegations. In *Katz*, 709 F.2d at 256, the court held that, in order to prevail, the plaintiff "must show that the employer knew or should have known of the harassment, and took no effectual action to correct the situation." *See also Rabidue*, 805 F.2d at 621; *Barrett v. Omaha National Bank*, 726 F.2d 424, 427 (8th Cir. 1984). Put another way, the plaintiff must demonstrate either that her complaints landed on deaf ears, or that the harassment was so pervasive that employer awareness could be inferred. *Id. See also Swentek*, 830 F.2d at 558.

Here, the testimony was undisputed that other LSI employees were wholly unaware of Todd's conduct. Both Deborah Pettit and Hollis Stevens worked within close viewing range of the plaintiff, yet neither noticed anything to indicate that sexual harassment was occurring. Furthermore, Kouri never took advantage of Lininger's "open-door" policy or sought to complain to any other persons. Although she contends that she told James McGuire, one of the LSI vice-presidents, about the situation in a phone conversation, McGuire, whose testimony the court finds more credible, steadfastly denied hearing any such complaints of sexual harassment.

Nor does the court find that Todd, as Director of Personnel, held a position of sufficient authority as to impute his actions to LSI. He appears to have been much more a paper pusher than a signal caller, as evidenced by the fact that F. T. Lininger even had the final say as to all his salary recommendations. Accordingly, Kouri could not have satisfied the respondeat

superior element of her "hostile environment" claim by imputing Todd's actions directly to LSI.

B

The plaintiff further sought to show that Todd conditioned her prospective salary boost on acquiescence to his sexual demands. In order to prevail on her claim of *quid pro quo* sexual harassment, Kouri has the ultimate burden of persuading the court that (1) she belongs to a protected class, (2) she was subject to unwelcome sexual harassment, (3) the harassment was based on sex, and (4) her acceptance of the harassment was an express or implied condition to the receipt of job benefits.[2] *Spencer,* 894 F.2d at 658. In instances of *quid pro quo* harassment by supervisory personnel, the employer is held strictly liable. *Katz,* 709 F.2d at 255, n.6.

Kouri contends that, by simultaneously showing her the salary review and accusing her of having an affair with a fellow employee, Todd impliedly suggested that she succumb to his sexual desires as consideration for advancement in the company. The court rejects this argument. Hitherto, Todd had never made any express or implied offers for sex. Though he was undoubtedly jealous that Kouri socialized with other men in the office, it would have been an extremely incongruous chapter in this story to contend that he demanded sex from her in exchange for a recommendation of promotion. A *quid pro quo* offer was simply not Todd's style. In sum, the court finds Kouri entirely lacking in credibility on this issue, and it refuses to buy into her theory of Todd's intentions.

C

As a final matter, it is noted that, even if the court found in favor of the plaintiff, it would have limited her damages to backpay between the June 9, 1988 date of her resignation and the August 1, 1988 date of LSI's offer of reinstatement. In

2. Here, the court has no difficulty finding that the first and third prongs of the test are met.

Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32, 102 S.Ct. 3057, 3065-66 (1982), the Court held that the employer can toll the accrual of backpay liability by unconditionally offering the Title VII plaintiff a job substantially equivalent to the one he was denied. *See also Edward v. School Board of City of Norton*, 658 F.2d 951, 954 (4th Cir. 1981) (analogizing Title VII to the National Labor Relations Act).

Here, Wiswall offered Kouri a job in the Investigations Division at the same rate of pay as her prior position and with backpay and benefits retroactive to the date of her resignation. This was a quasi-legal position that required more conceptual skill than her work with Todd and offered a better opportunity for advancement with the company.

Kouri rejected the offer in part because it failed to grant her the salary and title promotion recommended by Todd. Yet, given that Lininger, who had the final say on these matters, had not yet approved that recommendation, especially because he remained skeptical about its value as a disinterested evaluation, it was entirely reasonable for the company to demand another one month probationary period.

Furthermore, by fall 1988, the plaintiff's earnestness about working any job may be called into question. She first worked very briefly for British Aerospace, then worked very occasionally for Temps & Co., and finally, barely worked at all for a plastic surgeon. By December 1988, she stopped working altogether.

III. Conclusions of Law

The court thus concludes as a matter of law:

(1) that it has jurisdiction to decide this case, pursuant to 42 U.S.C. § 2000(e)-16, Title VII of the Civil Rights Act of 1964, as amended.

(2) that the plaintiff failed to prove that she was discriminated against on the basis of her sex because she failed to show that the alleged sexual harassment was unwelcome, that the alleged sexual harassment was sufficiently severe or

pervasive to create an abusive working environment, or that benefits of employment were conditioned on sexual favors.

(3) that the plaintiff failed to demonstrate that she put her employer on any notice of her complaints and that, therefore, there was any basis on which to impose liability on the defendant.

Accordingly, an appropriate order shall issue.

February 6, 1991
Alexandria, Virginia

United States District Judge

Supreme Court, U.S.
FILED
AUG 14 1992
OFFICE OF THE CLERK

No. 92-98

In The

Supreme Court of the United States

October Term, 1992

KAREN L. KOURI,

Petitioner,

v.

LIBERIAN SERVICES, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should decline the Petition for Certiorari because there is no conflict between the Circuits on what constitutes *quid pro quo* sexual harassment?

2. Whether the Court of Appeals for the Fourth Circuit correctly affirmed the District Court's ruling that Petitioner had failed to prove *quid pro quo* sexual harassment?

3. Whether the Court of Appeals for the Fourth Circuit correctly affirmed the District Court's rulings that there was no basis for imposing liability on Respondent, Liberian Services, Inc.?

4. Whether Petitioner has a cause of action for retaliation?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

On April 25, 1990 Kouri filed a complaint it the United States District Court for the Eastern District of Virginia against James N. Todd (hereinafter "Todd") Liberian Services, Inc. (hereinafter "Liberian Services"),[1] and Administrative Control Services, Inc. alleging that Todd sexually harassed her in violation of Title VII and the

[1] IB Holdings, Inc., is the immediate parent company of Liberian Services, with USLICO Corporation being the ultimate parent company. For a listing of all affiliates and subsidiaries, please see the schedule of ownership provided in the appendix.

Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.* (1988). Kouri also alleged three common law state claims, intentional infliction of emotional distress, assault and battery, Counts II, III & IV respectively (JAP 365-81).[2]

Kouri's Count I claim of sexual harassment against Liberian Services was tried in the United States District Court for the Eastern District of Virginia on November 15, & 16, 1990 before the Honorable James C. Cacheris. The trial court issued a memorandum opinion finding that the Plaintiff failed to prove that she was discriminated against on the basis of her sex; failed to demonstrate that she put Liberian Services on any notice of her complaints; and that there was no basis on which to impose liability on Liberian Services. Judgment was entered in favor of Liberian Services on February 6, 1991. Kouri appealed the District Court's judgment in favor of Liberian Services and the earlier dismissal of Counts II, III & IV in favor of Todd and Liberian Services to the Fourth Circuit Court of Appeals.

The Court of Appeals for the Fourth Circuit, in an unpublished per curiam opinion dated April 13, 1992, affirmed the District Court's decision.

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[2] The court dismissed, by agreement, the claims against Administrative Control Services on July 20, 1990. Also by agreement on September 5, 1990 the court dismissed Kouri's Count I sexual harassment claim against Todd, but specifically reserved her right to appeal the court's early dismissal of the common law state claims against Todd. Kouri appealed the dismissal of the common law counts which appeal was denied as premature on September 27, 1990.

STATEMENT OF FACTS

In November of 1988, Karen Kouri was employed by Liberian Services as secretary to James Todd. Before her employment with Liberian Services, Kouri and her third husband, John, lived in Texas. She had two sons from a previous marriage, both of whom resided in Texas. One of her sons was homosexual and the other was involved in illegal drugs and went through drug rehabilitation. (JAP 196; 353-354).

Over the years Kouri had sought medical treatment and on occasion been hospitalized for complaints of nightmares, feelings of terror, breaking out in cold sweats, severe migraine attacks, abdominal cramps, back pain, head injury, dizziness, vertigo, anxiety and stress as well as several miscarriages, many of which were associated with family or personal problems. (JAP 198-203; 611-48). She suffered from physically debilitating migraine attacks at least several times a year lasting 26 to 42 hours at a time. (JAP 198-203; 275-76). She was regularly prescribed, valium, zanax, demerol, inderol for the migraine attacks and occasionally compazine. In 1985 Kouri's doctor asked her to undergo a psychiatric evaluation, which she refused. (JAP 611-48; 200-02). Kouri's illnesses and periodic migraine attacks continued throughout her employment with Liberian Services.

James Todd was divorced and had a son who was involved with drugs and undergoing rehabilitation. (JAP 354). Shortly after Kouri's employment, Todd and Kouri began discussing their mutual problems with their children. Kouri discussed with Todd her son's drug rehabilitation and helped Todd through this difficult period.

(JAP 353-355). Kouri offered Todd a great deal of personal and emotional support. (JAP 335-55). She told Todd about her work history, her several miscarriages, the fact that she did not want additional children, but her husband did, about her one son's homosexuality, and the other son's drug dependency problems. (JAP 353-54).

Todd and Kouri were also neighbors. He had a standing invitation to join the Kouri's for pizza every Friday night. (JAP 357-58). He had dinner with the Kouri's three or four times, had lunch with Mr. and Mrs. Kouri once, and lunch with Kouri during work hours approximately five to six times during the six month course of her employment. (JAP 263; 278; 357). They had drinks together at the Sheraton after work about three times (JAP 357), which was not unusual among employees. (JAP 336).

During January and February of 1988, Kouri was hospitalized at least twice for back problems. Todd visited her in the hospital a total of four or five times. (JAP 362). Todd always called first and normally came from his home. On one occasion he called from the hospital. Kouri always invited Todd up to visit with her and he normally did not stay long because of hospital rules and Kouri's condition. No one ever asked him to leave. (JAP 361-62). While Kouri was hospitalized, Todd brought her two gifts, a small crystal dog and a can of cookies. On Valentines Day he gave her a balloon and a sandwich. (JAP 636).

During secretaries week in late April 1988, Todd wrote various notes to Kouri thanking her for her assistance, some of which were intended to be humorous.

(JAP 449; 453-54; 455-56; 457-58; 488-89; 490; 651). On secretaries day Todd gave Kouri a written "Invitation with the boss:" the invitation contained a reference to an evening out at his expense with a notation "I picked a weekday so as not to interfere with your weekend - - however if you prefer we could do it Friday/Saturday evening as long as it is okay with John . . . if you accept, after we discuss, I will call John and ask his permission". (JAP 652-53). On April 25, 1988 Todd wrote Kouri a note wishing her a week filled with fun and joy. He thanked her for her continued loyalty and support and told her that he valued her advice and assistance in a very important job. He offered one night of babysitting whenever she chose "so that you and John may have an evening out". (JAP 467). None of the notes said that Todd was in love with Kouri, used the words "I love you," or contained any other lover-like references. (JAP 651-58; 449-91). In many of the notes Todd thanked Kouri for being his friend, and one note reflects Todd's ongoing work with his son, David, written in response to Kouri's inquiry. (JAP 453).

Deborah Pettit (hereinafter "Pettit") was secretary to Hollis Stephens. Pettit, Kouri, Stephens and Todd worked in the same office area. Initially, Kouri's desk was in an open area along a main hallway on the sixth floor. Later Kouri moved to an office between Todd and Stephens. After Kouri's move, she was directly across from Pettit's desk. (JAP 295-97). Kouri's office had a glass partition wall facing Pettit's desk and a glass wall between Kouri's and Stephens' office (JAP 297-98; 334). At no time during Kouri's employment did Pettit or Stephens observe unusual or inappropriate conduct by Todd toward Kouri.

(JAP 333-35; 297-98). Kouri never made any complaints or allegations that Todd had sexually harassed her or made her feel uncomfortable. (JAP 297-98; 333-35).

Todd never tried to kiss Kouri; never asked Kouri to have sex with him; and never asked Kouri to go to bed with him. (JAP 659; 371; 209-10). Todd never wrote or told Kouri that he loved her. (JAP 215; 371; 209-10). Todd never promised an increase in salary, a promotion or job benefits if she would have sex with him, and never threatened her with any adverse consequences if she would not have sex with him. (JAP 434; 384-92).

On May 6, 1988 Kouri telephoned Todd's supervisor, F. T. Lininger. He was not in so she was transferred to James McGuire, a Vice President of Liberian Services, Inc. Kouri told McGuire that she could no longer tolerate working for Todd and could not tolerate the constant tension of being his secretary. (JAP 315-16). She was at home very emotional, crying and upset. McGuire advised Kouri to stay home, compose herself over the weekend, and when she came in on Monday he would take her directly to Mr. Lininger. (JAP 315-16). McGuire thought Kouri was upset with Todd for working her too hard (JAP 316). Kouri never told McGuire that Todd was sexually harassing her or making unwanted advances (JAP 315-16).

Later the same afternoon, McGuire was told that both Mr. and Mrs. Kouri were in the office meeting with Todd. Shortly thereafter a very composed and calm Kouri appeared in McGuire's office, told him to forget everything, and that the matter with Todd had been resolved. (JAP 316-17). Nevertheless, on Monday McGuire met

with Lininger and informed him of his conversation with Kouri, including her appearance in his doorway and request that he forget everything. (JAP 317). Lininger met with Todd to discuss the matter and was assured that everything had been resolved. (JAP 305). It was Lininger's impression that Todd and Kouri had an argument or run in of some sort over the job. He was never told of any complaints of sexual harassment or unwanted advances.

On May 6, 1988 Kouri met with Todd in his office. She told him that they would have to stop having lunch together, that people were beginning to talk, and there were a lot of rumors going around the company. Todd told her that he appreciated her honesty and she went back to work. After that conversation they continued working together in a more professional manner and nothing unusual happened until the date of her resignation. (JAP 383-84).

The general work atmosphere was professional with most employees on a first name basis, congenial with one another, and an open door policy to the chairman for employee complaints. Any employee could talk to Lininger or McGuire about a complaint. (JAP 432-33; 304; 381; 336-37). Furthermore, the personnel committee composed of employees in various divisions of the company, was still in existence for receiving employee complaints. (JAP 303; 432-33). The more formal procedure for complaint as set forth in the company's policies was to first report directly to the supervisor, or, if that was impractical, to a member of the personnel committee. The committee members were named in Kouri's copy of the company policies. (JAP 543). Kouri never reported any

claims of sexual harassment or unwanted advances to Lininger, although she was aware of the open door policy as evidenced by her call to him on May 6, 1988. (JAP 433; 152).

Liberian Services' employment policies provided that new employees received employment evaluations and any recommendations for raises and/or promotions at six months from the beginning of their employment, and annually thereafter (JAP 360-61; 306-07; 343). A six month review did not automatically provide for increase in pay or promotion in grade or title and all raises or promotions had to be personally approved by the Chairman, F. T. Lininger. (JAP 361; 306-07; 386).

In early June 1988 Todd prepared a six month evaluation on Kouri for submission to Lininger for approval. (JAP 385-86). During the course of Todd's discussion with Kouri regarding her long range employment goals and his evaluations of her performance up to that point, Todd showed her the evaluation without salary recommendations and told her he intended to submit it to Lininger. (JAP 384; 386). Todd also discussed the areas in which Kouri needed improvement. Todd told her the importance of preserving the confidentiality of the personnel department by carefully monitoring information Kouri discussed with other employees, including Greg Lee, who was employed in the accounting department and had access to payroll information. (JAP 387-89). Todd never threatened to withhold submission of the evaluation and in fact did submit it along with certain salary recommendations to Lininger. (JAP 392). Nothing Kouri said during the course of that discussion influenced the recommendation prepared by Todd. (JAP 392). Lininger did not act upon Todd's recommendation because he had his own

reservations about Kouri's productivity and reliability as an employee. (JAP 302-03; 307).

Kouri resigned from Liberian Services on June 9, 1988. Later she filed a written complaint against Liberian Services and James Todd. Frank Wiswall, a Vice President, conducted an investigation into Kouri's allegations. This in-depth investigation lasted several weeks and included interviews with past and present personnel, as well as discussions with Todd and Mr. and Mrs. Kouri. (JAP 26-28; 32; 40-42). Wiswall discovered that there were no previous complaints of sexual discrimination or harassment against the company; that there was no evidence of any sexual harassment by Todd against Kouri or any other employee; and no evidence of physical advances of any kind. (JAP 40-41). He did discover that Kouri and Todd had developed a close friendship which arose out of their experiences with their children's drug problems. (JAP 32-33). Wiswall also discovered that Todd's recommendation and evaluation of Kouri's job performance was inappropriate and contrary to what Wiswall's investigation revealed about Kouri's ability and performance. (JAP 30-31; 34). Based on these findings, Wiswall recommended that Todd be reassigned. (JAP 30-31; 33-34).

Wiswall also recommended a more active personnel committee. Although still in effect during Kouri's employment, it was not as active as it had been in the past. An employee in any division with a personnel matter could go to someone within their division who is a member of the personnel committee, rather than limiting their contact to a central head. This system provided better communication of problems within the company

and a greater awareness of personnel problems. (JAP 35-39). A reorganization of the personnel department resulted in Hollis Stephens replacing Todd as Director and Chairman of the Personnel Committee. Deborah Pettit was Steven's secretary and under took most of Kouri's former duties. Part of Kouri's duties were reassigned to another department. (JAP 38-40; 309; 340-41).

On July 25, 1988, Wiswall offered Kouri reinstatement with Liberian Services as secretary to the Marine Investigations Division. The Chief of that division, Captain Chadwick, had a substantial secretarial and support staff need. (JAP 42-48; 327-28). The position involved legal work, significant contact with the public and governmental representatives, editing, typing, proofreading of special maritime reports concerning shipping disasters which are published throughout the maritime community. Chadwick had greater seniority than Todd and the position offered to Kouri had significant potential for advancement in title and salary. (JAP 342-43; 311-13; 43-45). The Marine Investigation's position was located two floors above Todd's new office and would have involved no interaction with Todd. (JAP 39-50).

Liberian Services also offered Kouri back pay retroactive to the date of her resignation, and an evaluation with Chadwick after one full month of employment in the Investigations position. Any recommendation Chadwick made for a salary increase would be retroactive to her original six month review date in June 1988. (JAP 45-46). Kouri requested that the offer be put in writing and this was done in a letter dated August 1, 1988. (JAP 50-51; 497-98). Kouri rejected the offer by letter dated August 8, 1988. (JAP 495-96).

Thereafter, Kouri worked sporadically for other companies until December of 1988 when she voluntarily quit her position and since that time was unemployed. (JAP 226; 291; 292-94; 192; 600-02; 609). She became pregnant and had a child in 1989, and after August of 1989 Kouri made absolutely no effort to secure additional employment. (JAP 660-61).

ARGUMENT

REASONS FOR DENYING THE WRIT.

I. There is no conflict among the Circuit Courts and the decision below was correct.

A. The Court of Appeals for the Fourth Circuit correctly affirmed the District Court's ruling that Petitioner failed to prove *quid pro quo* sexual harassment.

Two forms of sexual harassment are unlawful under Title VII of the Civil Rights Act, 42 U.S.C. 2000e *et seq.* One is the claim of hostile environment, in which the party must show: (1) that the conduct in question was unwelcome; (2) that the harassment was sufficiently severe or pervasive to create an abusive working environment; and (3) that the employer had actual or constructive knowledge of the sexually hostile working environment and took no prompt or remedial action. *Spencer v. General Electric Co.*, 697 F. Supp 204, 217, *rev.'d in part* 894 F.2d 651 (4th Cir. 1990); *Swentek v. USAir*, 830 F.2d 552, 557 (4th Cir. 1987); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989). The other is known as *quid*

pro quo sexual harassment, in which a supervisor demands sexual consideration in exchange for job benefits. *Spencer v. General Electric Co.*, 894 F.2d at 658; *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983); *Meritor Savings Bank v. Vinson*, 477 U.S. at 65.

In order for a plaintiff to establish a prima facie case of *quid pro quo* sexual harassment, she must prove the following:

(1) the employee belongs to a protected group;

(2) the employee was subject to unwelcome sexual harassment;

(3) the harassment complained of was based on sex;

(4) the employee's reaction to harassment complained of affected tangible aspects of the employees compensation, terms, conditions, or privileges of employment.

Spencer v. General Electric Co., 697 F.Supp. at 217.

The trial court made a factual finding that Todd's attention was not unwelcome (JAP 430); and that Todd never made any express or implied requests for sex or never demanded sex from Kouri in exchange for a recommendation for promotion (JAP 434). The court also found Kouri "entirely lacking in credibility on this issue, and it refused to buy into her theory of Todd's intentions." These factual findings are based on the trial court's determination that Kouri's testimony was not credible.

The standard of review in a Title VII action is set forth under F.R.C.P. 52(a), "findings of fact . . . shall not be set aside unless clearly erroneous and due regard shall

be given to the opportunity of the trial court to judge the credibility of the witnesses." This is true even if the court resolves the ultimate issue as to whether or not there was sexual harassment or discrimination. *Dwyer v. Smith*, 867 F.2d 186, 187 (4th Cir. 1989).

The trial court's factual findings may be overturned on appeal *only* if they are clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Rule 52(a) emphasizes that special deference should be given to credibility determinations made by the trial court: factual findings which are based on determinations regarding the credibility of witnesses should be afforded great weight, "for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief of what is said." *Id.* When the trial court's findings are based on the judge's decision to credit the testimony of two or more witnesses, each of whom has told fairly plausible stories that are not contradicted by extrinsic evidence, that finding, if not internally inconsistent, **can virtually never be clear error**. *Id.* (Emphasis added)

Kouri's Petition for a Writ of Certiorari suggests that the Fourth Circuit made a finding that there must be an express request for sexual favors in order to establish a prima facie case of sexual harassment, and that finding is in opposition to the opinions of other circuits which require that the conduct of the alleged harasser merely be sexual in nature when considered in the totality of the circumstances. Kouri's argument on this issue highlights a difference without a distinction. The District Court and the Fourth Circuit Court of Appeals did *not* find that an explicit request for sexual favor was a prerequisite for the

plaintiff to establish a prima facie case. In fact the trial court found that in Kouri's case, no express ***or implied*** requests for sexual favors were made by Todd. The Fourth Circuit's definition of sexual harassment is substantially the same as the definition used by other federal circuits. *See Jones v. Flagship International*, 793 F.2d 714, 721-22 (5th Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982).

Assuming, arguendo, that there was a conflict between the circuits on the nature and extent of conduct necessary to support a sexual harassment claim, Kouri's case does not present a factual scenario upon which to resolve any alleged conflict because the trial court found that Kouri failed to prove another independent element of her prima facie case on harassment, that Todd's advances were unwelcome. (JAP 434).

B. The Court of Appeals for the Fourth Circuit correctly affirmed the District Court's ruling that there was no basis for imposing liability on Respondent Liberian Services, Inc.

To prove a claim against an employer under Title VII, it must be shown that the conduct in question was unwelcome, that the harassment was based on sex, that the harassment was sufficiently severe or pervasive to create an abusive working environment and some basis for imposing liability on the employer. Civil Rights Act of 1964 Section 701 *et seq.*, 42 U.S.C. Section 2000e *et seq.* An employer is held liable where it had actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action. *Swentek v. USAir, Inc.*, 830 F.2d at 558. In

establishing the employer's knowledge, the plaintiff may demonstrate that the complaints about the harassment were lodged with the employer or that the harassment was so pervasive that the employer is deemed to be aware of its existence. *Katz v. Dole*, 709 F.2d at 255.

Kouri failed to prove Liberian Services' liability. The trial court analyzed the testimony and evidence presented by all parties and made a factual determination that Kouri failed to prove that she was sexually harassed by Todd. Specifically, the trial court found that Todd's conduct was not unwelcome. The question of whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determination of the trier of fact. *Meritor Savings Bank v. Vinson*, 477 U.S. at 68. The court's findings are not against the clear weight of the evidence and, absent a showing that they are clearly erroneous, should be upheld on appeal.

The issue of employee liability arises only after the court determines that Kouri was the victim of harassment. Kouri had the burden of proving that Todd's conduct was sufficiently severe or pervasive to create an abusive working environment. *Katz v. Dole*, 709 F.2d at 256. In assessing the work environment, the court must evaluate the totality of the circumstances surrounding the alleged conduct. *Spencer v. General Electric Co.*, 697 F. Supp. at 218 *citing Highlander v. KFC National Management Co.*, 805 F.2d 644 (6th Cir 1986). To determine whether the harassment was sufficiently severe or pervasive the trial court must examine the evidence *both* from an objective perspective and from that of the alleged victim. *Paroline v. Unisys Corp.*, 979 F.2d at 105. The trial court found that

Todd's conduct did not have the effect of "unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile or offensive working environment that affected seriously [her] psychological well being." (JAP 431). The trial court also made the factual finding that Todd's conduct would not have interfered with a reasonable person's work performance or created an intimidating, hostile, or offensive working environment that would have seriously affected a reasonable person's psychological well being. (JAP 432).

If the trial court's account of the evidence is plausible in light of the record viewed in its entirety, an Appellate court may not reverse even though convinced that, had it been sitting as the trier of fact, it would have decided the case differently. Where there are two permissible views of the evidence, the trial court's choice between them is not clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. at 574.

A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Miller v. Mercy Hospital, Inc.*, 720 F.2d 356, 361 (4th Cir. 1983); *Anderson v. Bessemer City*, 470 U.S. at 574. It is not the function of the appellate court to duplicate the work of the lower court and it is not to decide the factual issues *de novo*. This is true even when the trial court's findings do not rest on the credibility determinations but, instead, on physical or documentary evidence or inferences from other facts. *Anderson v. Bessemer City*, 470 U.S. at 574.

No other employees observed anything unusual between Kouri and Todd; they never heard of anything unusual between Kouri and Todd; and Kouri never complained to her co-workers about Todd. (JAP 296-299; 317; 333-35). The trial court relied on the testimony of Kouri's co-workers when concluding that other Liberian Services' employees were unaware of Todd's alleged conduct (JAP 433). The trial court's findings that the employer was unaware of a sexually hostile working environment was amply supported by the evidence and testimony presented at trial.

When Liberian Services was notified of a problem it took prompt and appropriate remedial action. James McGuire's testimony of the events which occurred in May of 1989 was found by the court to be more credible than Kouri's. Thus, the court's actual findings concerning the extent of Liberian Services' knowledge of Kouri's complaints and the nature of the working environment were not clearly erroneous.

After Kouri resigned her employment with Liberian Services, and filed an action alleging sexual harassment, the company performed an in-depth investigation into Kouri's allegations to evaluate the work place environment. As a result of this investigation, Liberian Services found no evidence of sexual harassment or sexual discrimination (JAP 40-41). An employer may be held liable if it ignores allegations of sexual misconduct or if it fails to take remedial action reasonably calculated to end the harassment. *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir 1991) *citing Katz v. Dole*, 709 F.2d at 256. In the case at bar, when Liberian Services was notified of a problem it took

immediate steps to evaluate, investigate and appropriately remedy the situation.

Kouri's argument that Todd's conduct is sufficient as a matter of law to impose liability on Liberian Services is contrary to any previous decisions decided by this court, and advocates a strict liability imposition on the employer in a sexual harassment hostile environment case. In *Meritor Savings Bank vs. Vinson, supra,* this court stated that the trial court should look to agency principles for guidance in the area of imposition of liability on an employer for the alleged discriminatory acts of a supervisor/employee. *Meritor Savings Bank v. Vinson,* 477 U.S. at 72. The determination of an employer's liability for the alleged discriminatory conduct by the supervisor is a question of fact. *Paroline v. Unisys Corp.,* 879 F.2d at 106. The District Court's credibility determinations in this case should be given due deference under Rule 52(a), and the testimony presented at trial shows that the court's findings in that regard were not clearly erroneous. *See Dwyer v. Smith,* 867 F.2d at 190.

Applying agency principles in this case, an employer will only be liable for the tortious acts of an employee where "the employee was performing his employer's business and acting within the scope of his employment." *Kinsington Assoc. v. West,* 234 Va. 430, 432, 362 S.E.2d 900 (1987). "Generally an act is within the scope of the employment if, 1. It was expressly or impliedly directed by the employer, or is naturally incident to the business and, 2. It was performed, although mistakenly or ill-advisably, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employers business,

and did not arise wholly from some external, independent and personal motive on the part of the employee to do the act upon its own account. *Id.* Whether the employee was acting within the scope of this employment is ordinarily a question for the trier of fact. *Id.*

The evidence presented at trial showed that Todd's conduct toward Kouri was neither expressly nor impliedly directed by Liberian Services. The District Court's factual findings included the specific finding that neither management nor any of the other employees, including those working close to Kouri and Todd, were aware of anything unusual between the two. (JAP 427, 433). Todd's alleged conduct was clearly not a natural incident of Liberian Services business, and many of the alleged activities occurred after business hours or were purely social. (JAP 420-23).

The District Court's factual finding that Todd's job, even though classified as personnel director, was not characterized by the wide latitude or discretion characteristic of an agent who could bind or speak for the corporation, was not clearly erroneous. The District Court specifically found that Todd's position was of insufficient authority to impute his actions to Liberian Services. (JAP 433). Accordingly, based on the District Court's findings of fact, the clear evidence that none of Todd's alleged actions could be classified as falling within the scope of his employment or furthering the employers business, the Fourth Circuit Court of Appeals correctly found that Liberian Services was not liable for Todd's conduct.

C. Petitioner has no cause of action for retaliation.

As a threshold matter, retaliation was never alleged in the pleadings filed by Kouri with the Eastern District of Virginia. A reviewing court will generally not pass on a non-jurisdictional question which has not been decided on by the trial court in the first instance. In the case at bar, the Eastern District of Virginia did not have the issue of retaliation properly before it for review. Hence, the opinion of the trial court does not address this issue. Likewise the Fourth Circuit Court of Appeals did not address the issue of retaliation.

Kouri resigned her position with Liberian Services on June 9, 1988. On July 25, 1988 Liberian Services offered Kouri reinstatement as secretary to the Marine Investigation Division with backpay retroactive to the date of her resignation. Kouri's performance in this new position would have been evaluated by her new supervisor, Captain Chadwick, after she had performed in the new position for the period of one month. Any action taken on that review would be retroactive to the date of her original six-month evaluation. Wiswall's letter went on to state "It would, we feel, be entirely inappropriate in view of the charges you have made for the Company to rely upon the evaluation prepared by Mr. Todd." (JAP 498).

Liberian Services' discounting of Todd's evaluation shows that the company was taking Kouri's allegations seriously. It is entirely reasonable for the company to give little credibility to an evaluation prepared by Todd who, if Kouri were to be believed, was interested in advancing her in exchange for sexual favors not based on her performance and abilities.

The trial court was not persuaded that there was evidence to support Kouri's argument that Liberian's reevaluation of Kouri's performance was an act of retaliation taken by Liberian Services, Inc. Furthermore, the trial court's factual finding that Kouri was given a valid offer of reinstatement refutes her claim of retaliation. Finally, Kouri's half-hearted attempts at any subsequent employment and a complete failure to mitigate her damages also refute her claims.

Throughout her Petition, Kouri makes numerous assertions of fact which in reality were not admitted as fact at trial. Much, if not all, of her evidence was substantially contradicted by other evidence presented on behalf of Liberian Services, or in some places, her own evidence. A reversal of the lower court's findings in this case will involve a detailed inquisition into all of the evidence presented at trial, and a reexamination of the credibility determinations made by the trial judge. Such is not the purpose for granting of a Writ. The standard of applicable review is as set forth under F.R.C. Rule 52(a), and no useful purpose would be served by revisiting the issues lawfully tried in this case.

CONCLUSION

For the foregoing reasons, the court should deny Kouri's Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED
LIBERIAN SERVICES, INC.

By Counsel

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APPENDIX

USLICO CORPORATION
SCHEDULE OF OWNERSHIP
June 30, 1992

Company	% Owned	Jurisdiction	Nature of Business
USLICO CORPORATION	Parent	Virginia	
-United Services Life Insurance Company	100.0000	Virginia	Life Insurance Company
--Bankers Security Life Insurance Society	100.0000	New York	Life Insurance Company
--Provident Life Insurance Company	100.0000	North Dakota	Life Insurance Company
--United Olympic Life Insurance Company	100.0000	Washington	Life Insurance Company
---USLICO Corporation (300,000 shares)	----	Virginia	Parent Company
----Delaware Administrators, Inc.	100.0000	Ohio	TPA – Health
-USLICO Securities Corporation	100.0000	Delaware	Broker Dealer
-Bankers Centennial Management Corp.	100.0000	Delaware	Investment Advisor
-IB Holdings, Inc.	100.0000	Virginia	Holding Company
--USLICO Corporation (3,371,835 shares)	----	Virginia	Parent Company
--Northeastern Insurance Company of Hartford	100.0000	Connecticut	Reinsurance Company
--The New Providence Insurance Company, Limited	100.0000	Cayman Is.	Insurance Company
IB Resolution, Inc.	100.0000	Virginia	Service Company
---Washington International Limited	100.0000	Hong Kong	In Liquidation
--International Risks, Inc.	100.0000	Delaware	Insurance Agency
--The International Trust Company of Liberia (1)	82.8684	Liberia	Bank & Adm. Mar. Code
---Intrusco Corporation	100.0000	Liberia	Inactive
---80 Broad Street, Limited	100.0000	Liberia	Inactive
---Insurance Company of Africa	78.0968	Liberia	Insurance Company
----The Liberian Bank for Development and Investment (2)	3.9060	Liberia	Banking
---The Liberian Bank for Development and Investment (2)	5.6640	Liberia	Banking
--Registry Holdings, Inc.	100.0000	Virginia	Holding Company
---Corporate Services Company Limited	66.6667	Nevis	In Liquidation
---International Registries, Inc.	100.0000	Virginia	Service Company
----Liberian Services, Inc.	100.0000	New York	Rep. Serv. – USA
-----Liberian Services, Limited	100.0000	England	Rep. Serv. & Ship. Insp
-----Stichling International Registries	100.0000	Holland	Ship Inspection
-----International Registries (Far East) Limited	100.0000	Hong Kong	Rep. Serv.
-----Liberian Services (Greece) Limited	100.0000	Greece	Ship Inspection
----Marshall Islands Maritime & Corporate Administrators, Inc.	100.0000	Virginia	Rep. Serv.

Company	% Owned	Jurisdiction	Nature of Business
---American Security Management Corporation, Ltd.	100.0000	Marshall Isl.	Holding Company
----Administrative Control Services, Inc.	100.0000	Virginia	Service Company
----American Insurance Management, Inc.	100.0000	Liberia	Insurance Agency
----Atlantic Data Corporation	90.7534	Liberia	Data Processing
----Corporation Services, A.G.	100.0000	Switzerland	Rep. Serv.
----Export Purchasing Corporation	100.0000	New York	Purchasing Agent
----ICD Corporate Managers Limited	50.0000	Ireland	Corporate Mgmt. Service
-----ICD Corporate Services Limited	100.0000	Liberia	Service Company
-----ICD Corporate Directors Limited	100.0000	Liberia	Service Company
-----ICD Nominees Limited	100.0000	Liberia	Service Company
----Second ICD Nominees Limited	100.0000	Liberia	Service Company
----International Registries (Greece) Ltd.	100.0000	Greece	Rep. Serv.
----International Registries (U.K.) Limited	100.0000	England	Rep. Serv.
----International General Services, S.A.	100.0000	Luxembourg	In Liquidation to 1993
----International Registries, S.A.	100.0000	Marshall Isl.	Service Company
----Liberian Corporation Services, Inc.	100.0000	Delaware	Rep. Serv. – No. Amer.
----Liberian Services, S.A.	100.0000	Liberia	Rep. Serv. – Europe
----Provident Agencies, Ltd.	100,0000	Marshall Isl.	Insurance Agency
----Reston Maritime, S.A.	100.0000	Panama	Finance Company
---First United Corporate Services, Inc.	100.0000	Panama	Corporate Administration
---First United Maritime Services, Inc.	100.0000	Panama	Maritime Administration
---International General Subsidiaries, Inc.	100.0000	Delaware	Leasing and Contracting
---The Trust Company of the Marshall Islands, Inc.	100.0000	Marshall Isl.	Adm. Mar. & Corp. Code
----Majuro Nominees Ltd.	100.0000	Marshall Isl.	Service Company
---Marshall Islands Maritime Administrators, Inc.	80.0000	BVI	Service Company
-The International Trust Company of Liberia (1)	12.4272	Liberia	Bank & Adm. Mar. Code

(1) IB Holdings, Inc. owns 82.8684%. USLICO owns 12.4272%.

(2) The International Trust Company of Liberia owns 5.664%. The Insurance Company of Africa owns 3.9060%.